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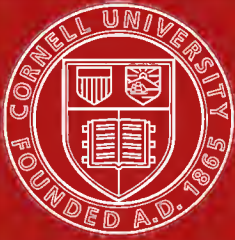
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Sir Walter Scott as a judge; his decision



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SIR WALTER SCOTT AS A JUDGE

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SIR WALTER SCOTT, ÆT. 48.

From the Mertoun portrait by T. Phillips (*never before reproduced*).

SIR WALTER SCOTT AS A JUDGE

HIS DECISIONS IN THE SHERIFF
COURT OF SELKIRK

BY

JOHN CHISHOLM, K.C.

SHERIFF OF ROXBURGH, BERWICK, AND SELKIRK

EDINBURGH
W. GREEN & SON
LIMITED
LAW PUBLISHERS

1918

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PREFACE

OWING to a variety of causes resulting from the outbreak of war, the publication of this book has been delayed.

I wish to express my thanks to my friend, Mr. John Carmont, Advocate, 7th Battalion The Black Watch, for his assistance in revising the proof-sheets during his convalescence after service on the Western front.

Also I am anxious to record my gratitude to my friend the late Mr. Mackintosh, Sheriff-Clerk of Selkirk, for the help he gave me in arranging the Sheriff Court processes for the period during which Sir Walter Scott was Sheriff of the county.

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INTRODUCTORY

Sir Walter Scott was appointed Sheriff of Selkirkshire on 16th December 1799.¹ At that time he was in his twenty-ninth year, and he had been a member of the Scottish Bar for seven years and a half. He held the office of Sheriff until his death on 21st September 1832; that is, for the long term of thirty-three years. During the last few months he was incapacitated by illness.

The purpose of this book is to afford the reader the means of forming an opinion as to what manner of judge this celebrated man of letters was, and how he played this particular part of the many parts which he played in his time. The judgments which he pronounced in the course of those three-and-thirty years have up till now lain buried among the papers of the Sheriff Court at Selkirk. From a chaos of judicial *dossiers* they have now been unearthed, and they are set out here, with such an explanation of the cases in which they were delivered as is necessary for their understanding, and as is sufficient to indicate the nature of the lawsuits and the misdemeanours which engaged Sir Walter Scott's attention, and to allow a glimpse, at least, of some of the suitors and some of the law-breakers who came before him.

In passing, only this much need be said of the subject-matter of these cases. Many of them, of course, arose from those relations in life with which the Law Courts are most familiar. There were disputes between landlord and tenant, master and servant, tradesman and customer, seller and buyer; between adjoining proprietors, and so forth. But not a few had their origin in the events and customs of the times, and of the locality. Those were the days of toll-bars and of post-horses; of the French wars and French prisoners; of

¹ He succeeded Andrew Plummer of Middlestead, who had been appointed Sheriff on 22nd January 1785, and had died in the autumn of 1799. According to Lockhart, Mr. Plummer was "an early ally of Scott's, a scholar and antiquary," who had entered with zeal into his ballad researches. His name occurs more than once in the Notes to the *Border Minstrelsy*.

Sir Walter was admitted to the Faculty of Advocates 11th July 1792.

thirlage to mills; of a somewhat austere observance of the Sunday. Then, as now, the locality was the land of Common Ridings; and then, as now, it was the land of Tweed—of the beautiful river, that is to say, which, with its scarcely less fascinating tributaries, has seduced generation after generation of the King's lieges to fall into the lawless practice of poaching.

Before more is said of the judgments themselves, it is necessary to describe the relative positions of Sheriff and Sheriff-Substitute in the time of Sir Walter Scott. It may be said, with sufficient accuracy for the purposes of this description, that the Sheriff Courts in Scotland correspond to the County Courts in England, with this difference, that the former have a jurisdiction in criminal matters as well as in civil. At the present time the Sheriff (or Sheriff-Depute, or Sheriff-Principal, for the three designations are synonymous) may personally exercise all the jurisdiction of the Sheriff Court as a Court of first instance; but primarily he is an *Appellate* judge in civil cases. The Sheriff-Substitute is the judge of first instance. From the decisions of the Sheriff-Substitute there lies an appeal to the Sheriff; and from him in turn there is an appeal to the Court of Session; and, ultimately, to the House of Lords. But in Sir Walter Scott's day the relation between Sheriff and Sheriff-Substitute was altogether different. The Sheriff was himself the judge of first instance, and was *only* a judge of first instance. His Sheriff-Substitute was in reality, as well as in name, a *Substitute*. He acted for the Sheriff—either in his place when he was absent, or by carrying out his instructions at the seat of the Court, the Sheriff being non-resident. There was no appeal from any judgment of the Sheriff-Substitute to the Sheriff, any such judgment being in theory the judgment of the Sheriff. Prior to 1839, if a litigant wished to have the judgment of the Sheriff reviewed, and did not choose to carry the case to a higher tribunal for that purpose, he was allowed to petition the Sheriff himself to reconsider his own judgment. It is necessary to keep this in view in order to understand the procedure in many of the cases in which Sir Walter Scott pronounced judgment. Such petitions (termed reclaiming petitions) appear to have been frequent, indeed usual, in the Sheriff Court of Selkirk. Originally there was no limit to the number of times a suitor might by reclaiming petition request the Sheriff to change his mind. By an Act of Sederunt¹ of 1709, how-

¹ *I.e.* an Order of the Supreme Court.

ever, the number was restricted to two. But the importunity possible even with only two petitions must occasionally have been a little trying to the temper, especially when the appeal took the form of mere remonstrance. Scott would appear to have become slightly exasperated on at least two occasions—once on account of the tenor of the petition¹ (when it proceeded to reduce *ad absurdum* the interlocutor appealed against); and again on account of the pertinacity of the party in adding fresh counter-claims after he had already exhausted his allowance of two reclaiming petitions.² On the other hand, such an appeal was sometimes successful, although I think in only one instance³ is a judgment reversed on the merits, and not on account of some change of circumstances or new facts.

It has already been mentioned incidentally that a Sheriff does not reside at the seat of his Court, as the Sheriff-Substitute is required to do. Sir Walter resided principally in Edinburgh. During the sittings of the Court of Session it was incumbent on him to be in daily attendance on that Court in Edinburgh, from 1806 onwards, for in March of that year he was appointed one of the Clerks of Session. When not in Edinburgh he resided in the county of Selkirk, but not in the town of that name. From May 1804 he occupied Ashiestiel. In May 1812 he removed to Abbotsford, which was thereafter his home at all times when he was free to betake himself to it. Scott's practice in dealing with the Sheriff Court cases, it may be gathered, was to have the processes sent to him—to Edinburgh or to his country house, as the case might be. There he read and considered them, and disposed of them by judgment or otherwise, according to the stage the proceedings had reached. His deliverances he wrote out with his own hand, in all but a very few instances. These judgments were then despatched to the Sheriff-Substitute at Selkirk, who dated and signed them, and issued them. In a number of instances Sir Walter had already signed his judgment—sometimes, it would seem, through inadvertence, since their form shows that it was intended that they should be signed by his

¹ Appendix, No. 3.

² Appendix, No. 77.

³ See *infra*, p. 55; Appendix, No. 44. In this case Sir Walter, who had mistaken the state of the law in what was at that time a confused branch of it, altered his decision, presumably because a certain decision of the Supreme Court was brought under his notice.

Substitute. In the *Journal* there is this passage, written at Abbotsford under date 12th December 1825:—"Was engaged the whole day with Sheriff Court processes." Another, under date 20th March 1826, again at Abbotsford:—"In the evening I read and sent off my Sheriff Court processes." Another, also at Abbotsford, under date 13th March 1827:—"Before breakfast, prepared and forwarded the processes to Selkirk." Another, under date 26th November 1827, at Edinburgh:—"Advised Sheriff processes and was busy." And the last reference of the kind, under date 9th June 1830 (Abbotsford):—"In the morning I advised Sheriff Court processes." And, in his *Life*, Lockhart states that he found "written in pencil, on what must have been the envelope of some Sheriff's process, this note, addressed to Mr. Charles Erskine, the Sheriff-Substitute of Selkirkshire:—"September 10, 1818.—Dear Charles,—I have read these papers with all attention this morning—but think you will agree with me that there must be an Eke¹ to the Condescendence.² Order the Eke against next day.³ Tom leaves with this packet a black cock and (more is the pity) a grey hen.—Yours, W. S.'"

Of course it was necessary for the Sheriff to go to the town of Selkirk from time to time to take evidence or to hear debates in the actions, or to take criminal trials;⁴ and he went to various places to inspect ground in dispute. But, for purely judicial work, his presence cannot have been required frequently. Most of the proofs were taken by the Sheriff-Substitute and reported to him. The Sheriff-Substitute held all the regular Courts and disposed of all the undefended actions and other formal business.

There are no interlocutor sheets in the processes—no separate document containing the judgments. The various deliverances are to be found on the several papers that make up the process, written on any vacant space that offers, but for preference on the particular document (be it Summons, Defences, Answers, Minute, or Reclaiming

¹ An addition.

² The statement of facts.

³ *I.e.* the next regular Court day.

⁴ In Scott's *Journal* there are notes of his presiding at criminal trials, *e.g.* under dates 1827, 14th April, 4th August, 30th August, 13th September; and 1830, 23rd December, when he held "a Black-fishing Court" at Selkirk, where he personally prevented the escape of a prisoner. As to this last, see also Mr. Craig Brown's *History of Selkirkshire*, vol. ii. p. 141.

Petition), with the contents of which the judgment more especially deals. These deliverances are written in Scott's clear, firm handwriting, with never a correction, and scarcely ever a clerical error.

Their form and their substance will be judged by the reader for himself. As regards form, I believe it will be admitted that they are notable for their succinctness and lucidity. Always they are remarkably brief. Notes explanatory of the grounds on which the formal judgments rest are now compulsory. In Sir Walter Scott's time they were optional, and rarely resorted to. He did not make use of this expedient a score of times in all. But his crisp, concise interlocutors adequately indicate the *ratio* of the decision. Findings in fact and findings in law are not differentiated.

It will be apparent to the most casual reader that these judgments, without exception, disclose a minute and painstaking study of the details of the case. Such treatment, of course, was to be expected from so conscientious a worker and so scrupulous a man as Sir Walter Scott. Nevertheless, it may well cause some surprise when we bear in mind that the term of his office as Sheriff was concurrent with the period of his intense literary activity and titanic literary output; and, moreover, that, during nearly the whole of it, he was chained for the greater part of the working day to the clerks' table in the Supreme Court.¹ Yet, had we been left to judge from these decisions alone, we should surely have received the impression that the judge who pronounced them was a judge and a lawyer in the first place, and not that they were but an insignificantly small and a heterogeneous part of his intellectual work.

What Sir Walter thought of many of those cases to which he gave this thorough consideration, we learn from his *Journal*. In full, the first of the passages (12th December 1825) from which I have already quoted above runs thus:—"Was engaged the whole day with Sheriff Court processes. There is something sickening in seeing poor devils drawn into great expenses about trifles by interested attorneys. But too cheap access to litigation has its evils on the other hand, for the proneness of the lower class to gratify spite and revenge in this way

¹ Scott was a Clerk of the Court of Session (with a salary of £1300 per annum) from 1806 until his resignation, 18th November 1830, when he remarks in his *Journal* that "my being released from the Court of Session" was "a circumstance of great consequence to my habits and comforts." His *Journal* abundantly shows how great was the interference with his literary work occasioned by those long days in Court.

would be a dreadful evil were they able to endure the expense. Very few cases come before the Sheriff Court of Selkirkshire that ought to come anywhere. Wretched wranglings about a few pounds, begun in spleen, and carried on from obstinacy, and at length, from fear of the conclusion to the banquet of ill-humour, 'D-n-n of Expenses.'¹ I try to check it as well as I can; 'but so 'twill be when I am gone.'" It is true that, for the most part, the disputes are petty. But it is, after all, *tantas* (or rather *tales*) *componere lites* that the Sheriff Courts are established in the land. The matters at issue were of vast importance in the eyes of the litigants themselves; and relatively to their estate in life the sums involved were of moment. The statement (in the passage just quoted from the *Journal*) that he tried to discourage unwarranted litigation refers, no doubt, to the way in which he awarded or refused costs. Often, as will be seen, expenses did not follow success where Sir Walter considered the action, or the full remedy asked, to be unjustifiable. In addition to this, it must have had a deterrent effect when he found a defender liable in a penalty instead of damages, and directed the sum to be paid, not to the complainer, but to the public prosecutor, or, as in one case,² to be applied towards defraying the cost of a new gaol!

Sir Walter Scott was strict in the matter of regularity of procedure

¹ Burns "Address to the Unco Guid." These censorious words recall the passage in *Guy Mannering* (published about two years earlier), where Dandie Dinmont is urging Pleydell to be his counsel in his plea against Jock o' Dawston Cleugh, about the "auld wark o' the marches again." "And what difference does it make, friend?" said Pleydell (referring to the area in dispute). "How many sheep will it feed?" "Ou, no mony," said Dandie, scratching his head; "it's lying high and exposed: it may feed a hog, or aiblins twa in a good year." "And for this grazing, which may be worth about five shillings a-year, you are willing to throw away a hundred pounds or two?" "Na, sir, it's no for the value of the grass," replied Dinmont; "it's for justice." "My good friend," said Pleydell, "justice, like charity, should begin at home. Do you justice to your wife and family, and think no more about the matter." Dinmont still lingered, twisting his hat in his hand. "It's no for that, sir; but I would like ill to be bragged wi' him; he threeps he'll bring a score o' witnesses and mair, and I'm sure there's as mony will swear for me as for him." And yet, when Pleydell did ultimately agree to take up Dandie's case, he remarked, "I don't see, after all, why you should not have your lawsuits too, and your feuds in the Court of Session, as well as your forefathers had their manslaughters and fire-raisions. . . . Many a man has come to my garret yonder that I have at first longed to pitch out at the window, and yet, at length, have discovered that he was only doing as I might have done in his case, being very angry, and, of course, very unreasonable."

² *Infra*, p. 27; Appendix, No. 15.

in the cases before him. As regards the pleadings of parties he was something of a purist, and he appears to have had, as most people have, a sturdy antagonism to prolixity and irrelevancy. Further, he jealously resented any disrespect shown to the Court. At the same time, lawyers will not fail to notice that he occasionally granted redress in a form which was not that craved in the summons, when equity required this disregard of strict form.

Lastly, the judgments contained in this book are, I think, all those which Sir Walter Scott issued. All, at least, that are to be found in the papers preserved in the Sheriff Court are given here. One or two processes, it is possible, may have been removed by the agents or parties on perfectly legitimate business, and not returned. But these must have been few. I know of only one which is not to be found amongst the Sheriff Court papers; and I have noted it as the last case in the appendix. In all, including that just mentioned, Sir Walter Scott gave judgment in one hundred and fourteen legal processes, of which one hundred and twelve were lawsuits or criminal complaints, the remaining two being respectively the suspension of a Sheriff-Officer and the order to hold a Fiars Court. This may not seem a very imposing array in three-and-thirty years. But the area of the jurisdiction was small, being limited to the county of Selkirk, and a great part of the shire was very sparsely populated. These cases, too, were defended cases only, and only a part of the defended cases. The undefended actions were disposed of by the Substitute. Also it must be noted—the dates of the decisions will show it—that as time went on Sir Walter personally disposed of fewer cases. The processes are there, one year with another, in practically the same numbers. But in increasing numbers they are left untouched by the Sheriff himself—left for disposal by his Substitute. After the year 1819 his judgments are very few.

Those judgments, or cases, which seem to be of more general interest are described in the pages which follow this introduction. In the appendix a complete list of the cases, arranged according to the date of the latest deliverance in the process, is given; and such of them as are not described or only partially described in the earlier part of the book are there set out at length.

During three-fourths of Scott's term of office his Sheriff-Substitute

was his friend, Charles Erskine, writer in Melrose. At that time the Sheriff had the appointment of his Substitute in his own hands, and the Substitute's commission fell with that of his principal.¹ Erskine's commission was dated 14th March 1800. Mr. Erskine did not actually reside in Selkirk, but in Melrose, a few miles distant. He would attend in the Sheriff Court on all regular Court days, and whenever necessary. Scott and he were on terms of great intimacy. He had helped Sir Walter in his money difficulties. Lockhart has included in Scott's *Life* a letter written by Sir Walter from Abbotsford to John Ballantyne, dated 14th October 1814, in which this passage occurs:—"Dear John,—Charles Erskine wishes his money, as he has made a purchase of land. This is a new perplexity—for paid he must be forthwith, as his advance was friendly and confidential. I do not at this moment see how it is to be raised, but believe I shall find means." The pencil note already quoted² shows how friendly and pleasant were their official relations.

Erskine, I venture to think, sat in Sir Walter's mental studio for the protrait of the Sheriff-Substitute in *Guy Mannering*—Mac-Morlan, "who was a man of intelligence and probity"—"a man o' character, and weel spoken o'." It will be noted that he appears in one of the cases (see *infra*, p. 41, and Appendix, No. 33) which came before the Sheriff—a complaint against the keeper of Glendinning Toll-bar, in which that person was charged with, *inter alia*, refusing tickets to Mr. Erskine and Mr. Nichol Milne of Faedenside, who were returning from Hawick, and keeping them sitting on horseback for about five minutes on a dark night.

Mr. Erskine held his last Court on 12th January 1825. In the Court Book of Selkirkshire there is an entry, under date 25th January 1825, in these terms:—"No Court. Mr. Charles Erskine, the Sheriff-Substitute, having taken ill yesterday in a Meeting of Road Trustees at Jedburgh, and died there this day." Sir Walter Scott's *Journal* was not begun until the autumn of that year; so we have no words of his regarding the death of his friend.

In succession to Erskine, Scott appointed as Sheriff-Substitute William Scott, younger of Raeburn. His commission is dated 10th February 1825. Mr. William Scott signs none of Sir Walter's judg-

¹ Sheriffs-Substitute are now appointed by the Crown, and hold office *ad vitam aut culpam*.

² *Supra*, p. 4.

ments. The few which were issued after Erskine's death are signed by the Sheriff himself.

Along with Erskine the Sheriff had another Substitute—I presume an honorary or unsalaried official, as is usual at the present time—to act on emergency in the case of the absence or illness of the regular Substitute. This was Mr. William Borrowman, a surgeon in Selkirk, who was appointed on 20th March 1800. Little seems to have been required of him officially; but, as will be seen, he issued one or two formal judgments.

The office of Sheriff-Clerk during Sir Walter's time was held first by Mr. John Lang, and then by Mr. Andrew Lang. Four generations of Langs in succession held this office. Mr. John Lang was appointed on 20th August 1782, and was succeeded by his son Andrew on 16th October 1805. Mr. Andrew Lang was, on 2nd October 1841, succeeded by his son John, who had been his depute since 1836. This Mr. John Lang was succeeded in the office of Sheriff-Clerk by his son, Mr. Patrick Sellar Lang, on 1st September 1868. Another son of Mr. John Lang was the late Mr. Andrew Lang, the distinguished historian and man of letters.¹

Mr. Andrew Lang, who was Sheriff-Clerk for twenty-seven of the thirty-three years during which Sir Walter was Sheriff of Selkirk, was for a time Chief Magistrate of Selkirk. Scott had a high opinion of him as a lawyer and official;² and in a letter³ to Lord Montagu, 3rd October 1819, where he describes with much humour a surprise visit of Prince Leopold to Abbotsford, and the ceremony of receiving His Highness as a burghess of Selkirk, Sir Walter remarks, "Lang made an excellent speech—sensible and feeling, and well delivered."

The office of procurator-fiscal (public prosecutor), then in the gift of the Sheriff, now in the gift of the Crown, was held by Mr. George Rodger, writer in Selkirk. He was allowed to continue to practise in civil cases, and appears as procurator in several of those which came before Scott.

¹ Mr. Patrick Lang held the office until 1879, when he was succeeded by Mr. Alexander Rutherford; and he in turn was succeeded in 1895 by Mr. D. M. Mackintosh, who died in 1917.

² See Mr. Craig Brown's *History of Selkirkshire*, p. 166.

³ In Lockhart's *Life*.

Other procurators who practised before Scott in the Selkirk Sheriff Court were Mr. Alexander Park, Mr. Robert Henderson, Mr. Andrew Henderson, and Mr. John Paterson. Of these, Mr. Park appears to have been the most forcible and the most daring. Specimens of his pleadings will be found below. In one case Sir Walter orders one of his defences to be withdrawn, and fines him personally half a guinea.¹ He died about 1815, and one case² concerns his executry. I think I am justified in stating that this Mr. Alexander Park was a brother of Mungo Park, the celebrated African explorer.³ Mungo, who was born at Foulshiels, near Selkirk, had a brother named Alexander, who is described as "of Selkirk," and who survived the traveller. This brother was stated in 1815 to have "recently" died.⁴ Another brother of Mungo, Archibald Park, held the office of Sheriff-Officer for the county of Selkirk,⁵ and it was he who introduced Mungo to Sir Walter Scott. Perhaps also the litigious Mr. George Park, afterwards referred to,⁶ the farmer at Carterhaugh and Oakwood, was a brother. Mungo was the seventh child of a family of thirteen.

Mr. Andrew Henderson, who appeared as solicitor in many of the cases, had been first procurator-fiscal, and afterwards Sheriff-Substitute, under Sir Walter's predecessor, Sheriff Plummer.

The Sheriff in Scotland performs the work which is done by a Revising Barrister in England—he adjusts the roll of parliamentary voters. This duty Sir Walter Scott was not fated to discharge. It was not he who presided at the first Registration Court under the Reform Act, the measure which he had so strenuously opposed. That Court was held at Selkirk on 19th September 1832, just two days before his death. The Parliament which had carried the Reform Bill into law had the melancholy task of passing, in the same session, an Act⁷ authorising the temporary appointment of a person to perform the duties of the office of Sheriff of Selkirk on account of the long-

¹ See Appendix, No. 31.

² See Appendix, No. 88.

³ Mr. Craig Brown so describes him, *History of Selkirkshire*, vol. ii. p. 133.

⁴ See Life prefixed to *Mungo Park's Journal*, published in 1815 (London: John Murray); and *Life of Mungo Park*, published in 1835; "Advertisement" (Edinburgh: Fraser & Co.).

⁵ See Lockhart's *Life of Scott*, vol. ii. p. 10.

⁶ See *infra*, p. 87.

⁷ 2 & 3 Will. IV. cap. 101.



SHERIFF COURT BUILDINGS (NEW TOWN HALL), SELKIRK,
WHERE SIR WALTER SCOTT SAT AS JUDGE.

continued indisposition of Sir Walter Scott. Accordingly at the Court, held as above stated, "for the Registration of Claims under the Reform Act," as appears from the minute of that date in the Registration Book of Claims, Thomas Hamilton Miller, Esquire, advocate, produced a commission from His Majesty, dated 10th August 1832, appointing him to act as Sheriff of the county of Selkirk; and it was therefore Mr Miller who presided at this Court.¹

The Court-room in which Sir Walter Scott, on his accession to office, administered justice was situated in the Old Tolbooth. This building, which had by that time fallen into decay, occupied a considerable part of the Market Place.² It was taken down in 1803. In its stead a new Court-house was erected, for the joint use of the county and the burgh, near the spot where its predecessor had stood, but not on the site of it. It was in this building that Scott held his Courts from the time of its completion until his death. It is now the Town Hall of Selkirk, the Sheriff Court premises being located in the more recently erected county buildings. In the case of *Stevenson* (narrated *infra*, p. 27) Sir Walter directed the fine imposed "to be applied to finishing the prison and correction-house of the burgh"—obviously that which was to replace the Tolbooth; but the Circuit Court did not adhere to his judgment in the case, and, accordingly, the building fund was not increased by this twenty shillings.

¹ On Sir Walter's death Mr. Hamilton Miller was appointed Sheriff of the county. His Sheriff-Substitute was Mr. Otto Herman Wemyss, advocate.

² See Mr. Craig Brown's *History of Selkirkshire*, vol. ii. p. 130, to which learned work I am indebted for these particulars. Opposite the page cited will be found a ground plan of the Old Tolbooth.

THE DANCING-MASTER'S BET

Thomas Dewar, a dancing-master in Selkirk, was the owner of a white pony. Either he had been boasting of its speed, or John Rome (variously described as a vintner and as a carrier) had been belittling the same, for in the beginning of November 1802 Rome "beted four guineas against the white powney or four guineas as the value thereof" that Dewar "should not trot the said white powney one mile in five minutes," the ground to be chosen by Dewar. Dewar having on his part accepted the bet, gave intimation to Rome "That upon the 21st December he was to Trott from the Milestone No. 34 counting from Edinburgh Southwards to the 35 Milestone on the High Road to Selkirk, and which he accomplished upon said powney, in the presence of witnesses within the said given time of five minutes; Yet John Rome most unjustlie refused to pay the foresaid sum of Four Guineas unless Compelled." Dewar raised an action in the Sheriff Court to recover payment of the four guineas, with interest from the 21st December. The statements above quoted are taken from the summons.

Rome lodged defences. It is sad to record that he took up an attitude which was very far from sportsmanlike. The making of the bet was not denied; it was not denied that the white pony had fairly won the wager for its owner. Rome meanly sheltered himself behind the illegality of betting. The defences, for the form of which his solicitor, Mr. George Rodger, was responsible, are worthy of being set out at length. In style, the document is a fair specimen of a good deal of the pleading in the inferior Courts at the time. Mr. George Rodger was procurator-fiscal of the county—the public prosecutor—and this fact *may* account for the line of the defences—the *illegality* of betting.

"In every age and in all nations certain actions of mankind have been deemed so prejudicial and hurtfull to society, as to render the interference of the Supreme Power absolutely necessary in order to prevent or suppress them. Among these deviations of moral conduct, the practices of Gaming and Betting or Wagering have been found to have been inimical to the welfare of Society, and the interest of the

subjects of Britain, and have accordingly been prohibited by the express Authority of the Legislature.

"In this Action the Defender is called upon to pay a Bett of Four Guineas which the Pursuer said took place between them in the month of November last that he would not trot his white pony one mile in five minutes. The Defender has only to oppose an Act of Parliament, vizt. the Ninth of Her Majesty Queen Anne,¹ and the Decisions of the Supreme Court, in order to set the Action entirely aside, by which all Gaming, Betting, and practices of the like nature are expressly prohibited, and all Debts contracted on these Accounts are declared to be null and void, even although they had been afterwards constituted by Bill or Bond. Indeed the prohibition in this Act of Parliament seems to have been so generally understood that in order to evade it, it is universally customary when any Bett takes place between Individuals in Gaming or Horse Racing either to stake the sum betted or to deposit it in the hands of a third party to be delivered to the Winner; but unless these precautions are used no action is competent to make the Bett effectual to the Winner.

"As if these practices, which are in themselves *contra bonos mores*, were under the protection of the law, the consequences would soon be felt to be prejudicial to the Interests of Society, domestic and political. In the present instance the Bett was neither staked nor deposited in the hands of a third person, and the Defender contends that, by the Act of Parliament above mentioned, it is not actionable, and he will of course fall to be assolzied from this Process, and found entitled to his full Expenses.—IN RESPECT WHEREOF,

"(Signed) GEO. RODGER."

To this rather mean defence the dancing-master (who was "now in Chapelhill") lodged answers. These are signed by Mr. Alexander Park,² writer in Selkirk, his solicitor.

"When Viewed as a moral lesson the Defences are more entitled to esteem than when considered as a Legal Defence agt. the present Action. The existance of a Bett is admitted in the Defences and the Objection stated why he Did not pay it is because such Transactions are *contra bonos mores*, and are declared by a Statute of Queen Anne not

¹ 9 Anne, cap. 14 (the Gaming Act, 1710), of which all but the half of one section has since been repealed.

² See *supra*, p. 10.

actionable. With regard to the immorality of the practice, The Respondent¹ is himself convinced that the Cause of Morality is not much strengthened by it; but the conduct of the Defender in attempting to screen himself under an Act of Parliament from the conclusions of this Action, when he knows that he not only *offered* but *provoked* the Respondent to accept of the Bet in question, is certainly not following that upright line of conduct upon which he harangues with so much eloquence, and verifies the truth of the observation that a man may *know* his duty and not practice it.

"The Act of Parliament opposed by the Defender as a Defence against the Action affords him no security, for by that Act, all debts contracted in the manner of the one lybelled, the amount of which does not exceed a hundred pounds Scots² are declared actionable, and may be sued for in any Court competent in the same manner as any other debt. The debt sued for is below the amount specified in the Act of Queen Ann, and the existence of it being admitted by the Defender, the pursuer therefore contends that he is entitled to your Lordship's decree in terms of the conclusions of the Lybell.

"The Pursuer³ lays much stress upon the circumstance of the sum betted not having been staked by both parties at the time it was offered and taken.—But even admitting this to be the case it is of no consequence, for the practice in this particular is neither requisite nor prevalent, and so far as matters of this kind are regulated by a supreme Association of Gentlemen, known by the name of the *Jockey Club*, it is by no means of any consequence, even in large sums, whether the money is Deposited; But in the present case the Defender is cut off from any Insinuation or Argument he may wish to Draw from this circumstance, on account of the sum lybelled being within the limitation of the Act of parliat., and therefore if not deposited at the time is lyabel and competent to be recovered in the same way as any other Existing Debt.

"Under these circumstances the Respondent flatters himself your Lordship will not Hesitate to Decern in Terms of the conclusions of the Lybell.—IN RESPECT WHEREOF.

"(Signed) ALEX. PARK."

¹ That is, Dewar.

² £8, 6s. 8d

³ This, of course, ought to be the defender.

The judgment in the case (written by Sir Walter Scott, but issued and signed by Mr. Erskine) was this:—

“SELKIRK, 23rd March 1803.—The Sheriff-Substitute, having advised with the Sheriff-Depute, Finds that independant of any special Statute it is *contra bonos mores* for the parties in the case to peril upon horse racing or wagers against time a sum which from their rank in life cannot be indifferent to them; Therefore assolizies the Defender; but finds no Expenses due.

“(Signed) CHARLES ERSKINE.”

THE CASE OF "THE WONDERFUL COW"

Henry Gill, butcher in Galashiels, bought a fat cow from the Earl of Lauderdale in the year 1802. Henry appears to have had in him the makings of an *impresario*, in a small way. He saw in his purchase more possibilities than the mere supply of beef. In the language of the subsequent legal proceedings, Gill "'carried' her to Edinburgh, in order to be exposed as a publick spectacle." To help him drive her to Edinburgh (for the journey of thirty-three miles was not the luxurious experience for the cow which the word "carried" might suggest), and to take charge of her while there, Gill employed one Andrew Bower, who resided at Selkirk Loanhead. Bower's wages were fixed at twenty-one shillings a week. Whether this enterprise of Gill's proved a success financially we do not know. Probably it did not. Andrew Bower, at any rate, found it necessary to raise an action in the Selkirk Sheriff Court against Gill to recover the sum of £9, 7s., being the balance of wages due to him under the contract. The amount of this balance, by the way, shows that the exhibition must have extended over several weeks. Gill's defence to this claim was that Bower, "having been entrusted with drawing the money from the persons who had the curiosity to see" the cow, received considerable sums in this way for which he had not accounted. So far from money being due to Bower, Gill maintained that the balance was the other way, and that he was entitled to an action of "Compt and Reckoning" against Bower. The first deliverance (which is in Sir Walter's handwriting, but is dated and signed by Erskine) is as follows:—

"SELKIRK, 23rd March 1803.—The Sheriff-Substitute, having advised with the Sheriff-Depute, appoints Henry Gill to lodge a Minute stating precisely whether the total charge of drawing the money for the sight of the wonderful cow¹ devolved upon Bower, or whether he only acted as doorkeeper occasionally; Also whether he called him to acco^t. every evening, or in what other way he

¹ The phrase is Sir Walter's.

received partial payments; And whether he or Bower kept any note of the visitors to the said Wonderful Cow. Allows Bower to see and Answer said Minute when given in.

"(Signed) CHARLES ERSKINE."

Gill put in the minute which was ordered, giving his version of the practice as to drawing the money; and Bower lodged answers to the effect that it was only occasionally, in Gill's absence, that he collected the money; that he accounted for it in all but a few cases; and that such money as he had retained was applied in part payment of his wages, and that the sum sued for was the balance of wages still remaining due. The final judgment is in Scott's handwriting. It is undated, and bears to be issued at Jedburgh—the solitary exception which I have been able to find to the practice of issuing the decisions in Selkirk. This interlocutor is written on the minute lodged by Gill, and is in these terms:—

"JEDBURGH.—The Sheriff-Depute, having considered this Minute and Answers, Finds the Defender Gill liable in payment of the sum of Nine Pounds seven shillings pursued for. Reserves to him his title to call Bower to account for the proceeds of the money received for seeing the wonderful cow in case he shall be advised to do so: finds no expenses due, and Decerns.

"(Signed) WALTER SCOTT."

There is no trace of Gill ever having brought his action of "Compt and Reckoning."

THE TAILORS' BANNER

A case which came before Sir Walter Scott in 1804 must have interested him not a little. It arose in connection with the great annual festival (I had almost written *rite*) of the Common Riding. Once in each year the Marches of the town's property are "ridden" by an imposing cavalcade, in accordance with faithfully preserved tradition. As a rule, all is harmony and concord; but in 1804 things did not glide along with their accustomed smoothness. The Incorporation of Tailors on that occasion declined to pay the magistrates the usual courtesy of attendance at the Common Riding procession, and intimated that, instead of this, they intended to have a procession of their own on the following day. The magistrates promptly issued a proclamation forbidding this procession. At first, it would appear, the tailors intended quietly to submit to the prohibition, but, "having met and dined together," they changed their minds. They resolved forthwith to parade the streets with their standard flying. Parade they did, accordingly, on the evening of 30th June in the year of grace 1804. While they were walking in procession with their standard, one Andrew Brown, a journeyman of the craft, but presumably not a member of the Incorporation, "attacked the Standard-bearer and wrested the Standard from his hands and tore it in such a manner as to render it completely useless." This description of the outrage is quoted from the summons in the lawsuit which followed. The action was brought by "William Thorburn, Taylor in Selkirk, Deacon of the Incorporation of Taylors, and John Paterson, Taylor there, his colleague," against the said aggressor, and it called on the Court to order him to furnish the Incorporation with a new standard or pay them a sum of £20 as the value thereof.

In his defences Andrew Brown states that he was acting under the authority of the magistrates in endeavouring to stop the procession; and that, "if the standard received any injury, he was not sensible of having done it; and that it would be more likely that the injury was received by the fall of the person who carried it." He

further pleaded, "That the colour itself was not by far worth one-fourth of the sum, and was a piece of as old, feeble, and patched-up stuff as can be imagined."

This touched the tailors on a tender spot and roused them into grandiloquence. In their answers they declared "that the Standard is inferior in appearance and value to none of the Incorporation Standards in Selkirk, and it is perhaps better than any of them, one only excepted, all of them being of silk with rich emblematical paintings. But it is not the intrinsic value alone of the Standard that ought to be considered in estimating the damage that will fall to be awarded against the person who has the audacity wilfully to destroy such an honourable ensign. The invincible standard of France was perhaps not worth thirty shillings of intrinsic value, and yet no person doubts that the usurper who presumptuously bestowed the title upon it would rather have lost as many thousand pounds as suffered the mortification of having it torn by our brave countrymen from his boasting legions, and its vainglorious name and memorials in one memorable day obliterated and deforced for ever."

The first interlocutor (which is in the handwriting of Sir Walter Scott, though dated and signed by Mr. Erskine) was intended to dispose of the case.

"SELKIRK, 18th January 1805.—The Sheriff-Substitute having advised with the Sheriff-Depute, Assoilzies the Defender from the charge of assault in respect he acted by the direction of the Magistrates; but in respect of his having torn the banner of the trade, the Sheriff appoints him to sew up and repair the breeches he has made therein; and, failing his doing so within eight days, the Sheriff authorises the Deacon to cause the said repairs to be made, with certification that the Defender will be found liable in a reasonable amount for the same. Finds no expenses due.

"(Signed) CHARLES ERSKINE."

The tailors were not satisfied with this decision. They presented a reclaiming petition asking the Sheriff to reconsider his judgment. In support of their prayer they pointed out that the standard in question "is a large piece of rich silk painted on both sides with emblematical designs. The scene is laid in Paradise, and exhibits the fall of man. The centre of the standard is occupied by the tree of knowledge of good and evil, the branches of which extend over the

whole banner; at the bottom of the tree, and on each side of it, our first parents are represented; Eve, with the fatal fruit in her hand, apparently in conversation with the foe of mankind (who has artfully entwined himself round the sacred tree), and Adam at a little distance. The extremities of the standard are occupied by passages from Holy Writ in letters of gold, applicable to the scene and denoting the fall of man. The whole piece is finished in a masterly manner, perhaps more so than your lordship might have imagined.”¹ Then they come to the injuries inflicted on the fatal 30th of June. “A painting upon silk of this description, when tore and destroyed at so many points as this Standard is, the petitioners contend it cannot be repaired by any operation of the needle without destroying the symmetry of the whole. For instance, our venerable progenitors have their bodies violently severed in different parts, and to attempt to repair the injury would have the effect of representing Eve with her head placed below her shoulders.” “The tree, too, has suffered greatly from the impious attempts of the Defender; it is cut in twain at the root; its branches and top are most completely broke and destroyed, and some of them with part of the Scripture language have disappeared for ever. The only figure on the painting that has survived the attack is the serpent, who still holds his place and proudly defies the ruin.”

It would be hard to trace in Scottish jurisprudence the precise maxim, rule, or principle which is given effect to in the Sheriff's final deliverance in this case! But the judgment was effectual. The interlocutor is written on the reclaiming petition with his own hand.

“SELKIRK, 23rd June 1805.—The Sheriff having advised this Petition, and having inspected the banner in question, finds that the same is capable of repair, and out of his respect to the craft has caused the same to be repaired in his own family. Therefore, refuses the Petition and prohibits further procedure. Finds no expenses due.

“(Signed) WALTER SCOTT.”

This flag has long since been retired from active use; but it is still

¹ It may be noted that in *The Pirate*, chap. xxxi., Bryce Snailsfoot's booth at the Kirkwall Fair had a sign of canvas painted “with an emblematic device resembling our first parents in their vegetable garments,” with a legend in verse calling attention to this raiment.

preserved,¹ though now in a very tattered and frail condition. In a number of places it has been stitched up—probably by the hands of Lady Scott or her daughters. The banner is dated 1770, and bears the legend: “They sewed fig-leaves together and made themselves aprons.”

¹ It is in the possession of Mr. Johnstone, clothier in Selkirk.

DESERTION OF DOMESTIC SERVICE

In the case of *Chisholm* against *Wilson or Nichol*, Scott attempted to correct an erroneous popular belief which, strange to say, survives in many quarters at the present day, viz. that the marriage of a female servant entitles her to break her contract of hiring without incurring pecuniary damages. The pursuer, Mr. Gilbert Chisholm of Stirches, residing in Edinburgh, sued Katherine Wilson, wife of Robert Nichol, Howcleuch, for damages for desertion of service between terms. The husband appeared in Court and stated that Katherine Wilson, immediately after leaving her service, had married him, and they understood that this marriage terminated the service. Sir Walter pronounced this interlocutor:—

“SELKIRK, 4th September 1805.—In respect the conduct of the Defender towards her master has been highly improper, and that the popular idea that marriage breaks terms is altogether unfounded, the Sheriff finds her husband liable to Mr. Chisholm in Three pounds damages and expenses and Decerns. The three pounds include expenses of process.

“(Signed) WALTER SCOTT.”

The defender's wages as nurse was £3 for the half-year.

Some months previously another action in this branch of the law had been decided in the Selkirk Sheriff Court. William Laidlaw, writer in Peebles, brought an action to have Agnes Scott of Selkirk ordained to return to his service, under penalty of damages and imprisonment—for such, at that time, were the remedies against deserting servants. The defender entered the service of the pursuer, as a domestic servant, at the wages of eighteen shillings and a pair of shoes for the half-year. She deserted, alleging that the work was too much for her, and “that she was sent out at untimely hours for her master to public-houses, and further that she did not get her meat sufficiently.” All this the employer denied. The first interlocutor (in Scott's handwriting, signed by Erskine) was:—

"SELKIRK, 13th March 1805.—The Sheriff-Substitute, having advised with the Sheriff-Depute, allows the Defender a proof of her Defences and the Pursuer a conjunct probation as accords.

"(Signed) CHARLES ERSKINE."

After proof, the case was disposed of by the following judgment (again in Sir Walter's handwriting):—

"SELKIRK, 12th June 1805.—The Sheriff-Substitute having advised with the Sheriff-Depute, Ordains the Defender to return to her Master's service, and to serve him for a time equal to that space for which she has deserted, and further fines her in ten shillings to be applied in defraying her master's expenses in the process.

"(Signed) CHAS. ERSKINE."

ACTIONS FOR DEFAMATION OF CHARACTER

There were, of course, actions for slander.

In 1800 James Riddle, merchant in Selkirk, raised such an action against Andrew Henderson, writer (*i.e.* solicitor or attorney) there. In point of time this was the second case to which Sir Walter had to give his attention. Riddle complained that upon a certain day Henderson "did assert and say that he was informed by the complainer that Archibald Park, tenant in Hartwoodmyrs, was resolved to give him a bloody nose the first time he met with him; and the said Andrew Henderson, upon being challenged by the complainer for falsely saying so in his name, did instantly size (*sic*) the said Thomas Riddle by the collar (*sic*) and called him all or one or other of the following epithits (*sic*) viz. Damned Liar, Damned Villian and Scounderal (*sic*) and Blackguard, from all of which it is evident that the said Andrew Henderson has been guilty of Scandal, Defamation, and manifest injury towards the Credit and Reputation of the Complainer." Riddle, therefore, asked for £50 in name of damages and expenses, and that the defender should be fined, in addition, £10. Further, he demanded recantation in these terms: "But also the said Andrew Henderson Defender ought to be ordained to compear (*i.e.* appear in Court) before the Sheriff while sitting in judgment, and repeat and subscribe a Palinode or Recantation acknowledging the foresaid defamatory expressions to be false and groundless, and to ask pardon for the same."

Now, Mr. Henderson, being a lawyer, pleaded that an action for slander was not competent before the Sheriff. This plea was sustained by Sir Walter Scott in the following judgment, which is both written and signed by himself:—

"SELKIRK, 10th December 1800.—The Sheriff-Depute, having considered the present process, finds that it is a proper action of scandal in which he can have no jurisdiction even by consent of parties, therefore dismisses the Action as incompetent; finds the Pursuer liable in expences, and allows an Acco^t to be given in.

"(Signed) WALTER SCOTT."

It may be pointed out here, as is done more explicitly in the Appendix (No. 2), that Sir Walter appears to have followed a reported decision (in 1745) to this effect. Before the next action for slander came before him, the question of whether a Sheriff has jurisdiction to entertain such actions had been authoritatively set at rest by a decision of the Supreme Court, which declared it to be the law that an action of scandal might competently originate before the Sheriff. Perhaps, however, when giving the above judgment the Sheriff of Selkirk had in view merely that part of the claim which asked for palinode. A Sheriff, as such, had not the power to order that particular balsam to the wounded feelings of the defamed. That could be done by him only as Commissary, and not as Sheriff. In the subsequent cases there is no conclusion for palinode.

The next slander case was in 1811. One Andrew Nicol, a merchant in Selkirk, raised it against George Turnbull, shoemaker there. The pursuer said that, a sum of money having been "abstracted from the house of John Melross, shoemaker," the defender, "casting off all fear of God and regard for his neighbours," had been guilty of the crime of calumniating and defaming him, and injuring him in his good name by raising and propagating the report that he, Andrew Nicol, was the person who had taken it. The following judgment (in Sir Walter Scott's handwriting) was pronounced—the decree in another action referred to in it had been pronounced by the Sheriff-Substitute:—

"SELKIRK, 13th March 1811.—The Sheriff-Substitute having advised with the Sheriff-Depute, Finds that, as the pursuer in the present action has already had a decree of damages against one member of the defender's family sufficient to clear his character and check the scandal, there is too much room to suppose that in this multiplication of processes he has in view some farther end either of profit or revenge to which the Sheriff can give no countenance. Therefore Assoilzies from the present action and Decerns, each party paying his own expenses.

"(Signed) CHAS. ERSKINE."

A third action for defamation, which did not proceed to a conclusion, and in which the only point decided was one of procedure, will be found in the Appendix (No. 83).

And there was a fourth. In the second last case with which Sir Walter Scott dealt, Andrew Haig, farmer, St. Helens, with consent of

the procurator-fiscal, sued William Paterson, stockingmaker, Selkirk, for £50 damages for slander. According to Haig's statement the defender, "in the house of William Ballantyne, with a view to provoke" Haig "to strike or fight with him, called him 'a damned liar'"—that most frequent of all slanderous expressions; that with which Scott began, that with which he ended, his experience of defamation actions. The Sheriff pronounced the following judgment:—

"SELKIRK, 30th March 1831.—The Sheriff being of opinion that the language libelled up indicates rather the existence of a brawl than of calumnious intention, fines and americiates the defender Paterson in ten shillings as having used language indicative of an intention to provoke a quarrel, and appoints the same to be paid to the publick prosecutor, and assoilzies him from the other conclusions of the summons.

"(Signed) WALTER SCOTT."

A SUCCESSFUL APPEAL TO THE CIRCUIT COURT

The course of certain proceedings taken to obtain redress for assault in the year 1805 has some points of interest. The action took the form, then common, of a criminal complaint combined with a claim for compensation. It was brought by Betty Stevenson, servant to George Currie, Esquire, of Greenhead, with concurrence of the procurator-fiscal, against Nelly Brown, servant to John Anderson, Senior, burgess in Selkirk, and arose out of a vulgar brawl between these two women. The complainer stated that on a certain evening she "came into the house of the said John Anderson to call upon his wife, when and where the said Nelly Brown did wantonly, maliciously, and without provocation, attack the person of the said Betty Stevenson and strike her on the forehead with a stone or some other hard substance she had in her hand, which cut her in a most shocking manner and occasioned the effusion of her blood and In an Eminent Degree endangered her life besides putting her in Bodily fear and Dread of Losing thereof."

This act

"That roars so loud, and thunders in the index,"

did not, after a proof, appear to the Sheriff to be of a very aggravated nature. The following interlocutor (in Sir Walter's handwriting, dated and signed by the Sheriff-Substitute) was pronounced:—

"SELKIRK, *3rd July* 1805.—The Sheriff-Substitute having advised with the Sheriff-Depute, fines and amerciates the Defender in the sum of twenty shillings sterling, to be applied to finishing the prison and correction-house of the Burgh; finds no damages due except expences of process. Modifies the same to Two pounds, and Decerns.

"(Signed) CHARLES ERSKINE."

This did not suit Betty at all. There was nothing for her out of the money which was going, and there is no reason for supposing that it afforded her any gratification to be an indirect contributor to the expense of building the town gaol. She appealed first to the Sheriffs

to reconsider their decision and to award her a sum of money. This petition was disposed of by Sir Walter Scott thus:—

“SELKIRK, 4th September 1805.—In respect the pursuer appears by no means faultless in the transaction in which the assault originated, Refuses the petition and Adheres to the interlocutor complained of. “(Signed) WALTER SCOTT.”

Still the young woman was not satisfied. She next appealed to “The Right Honourable One or More of the Lords Commissioners of Justiciary at Their next Circuit Court to be Holden at Jedburgh, fifteen days at least after service hereof.”

There was a Circuit Court at Jedburgh on 30th September 1805. Sir Walter would be in attendance as one of the Sheriffs within the district,¹ but it is not probable that he was present at the discussion of the appeal in *Stevenson v. Brown*. This was heard before Lord Meadowbank. Betty was victorious. His Lordship “sustained the reasons of the Appeal, and remitted to the Sheriff to recall his interloq. so far as regards the interest of the Appellant and to find her entitled to a *solatium* for the injury suffered of two pounds, and to the expences incurred for medical aid and the just expences of process.”

This was done by an interlocutor of 4th December 1805 in the Sheriff-Substitute’s handwriting and signed by him; the Sheriff did not condescend to touch the case again.

The perusal of the proceedings in this case leaves the impression that at the Circuit Court Betty fared much better than she deserved.

¹ Sir Walter was a fairly regular attender at the Circuit Courts of the district. To attend was part of his duties as Sheriff. These Courts were then held at Jedburgh, as they are to-day. In his *Journal*, under date 17th April 1826, written at Jedburgh, whither he had gone to be present at Circuit, he writes, “I have attended these Circuits with tolerable regularity since 1792” (i.e. since he was admitted to the Bar). On this occasion there were no cases set down for trial, and the presiding judge, Lord Gillies, “was presented with a pair of white gloves in consideration of its being a maiden Circuit.” Other entries in Scott’s *Journal* recording his presence at Circuit were under dates 19th September 1826 (where he describes the examination of a deaf and dumb illiterate woman, who was the victim of an assault, Lord Mackenzie being the judge) and 10th April 1829, when Lord Meadowbank presided.

THE TURF IN ETTRICK CHURCHYARD

In 1810 Charles Paten, minister of Ettrick, complained to the Sheriff, by letter, that “a shameful practice” had for some time past “taken place at Ettrick in cutting and otherwise abusing the Church yard for procuring turf in order to cover new made graves.” He craved interdict against this practice; “and in particular charges Walter Shiell, day labourer, who often digs the graves, when reproved for trespass against the rights of the minister, with refusing to desist.”

Shiell replied—also by letter. He had been sixty years in the parish, he told the Sheriff. “From his earliest recollection, along with the information of the oldest inhabitants,” he had never heard that the unoccupied (a grim phrase!) ground in the churchyard was the property of the minister. “The place was used for procuring sods for new made graves, and he would consider his work very ill finished were the graves left uncovered, particularly”—and here, with some lack of logical connection, but (as the sequel showed) with great effect, he rounds on his adversary—“particularly as the minister’s black cattle and swine roamed so frequently in the Church yard.”

To this Mr. Paten replied “that since the Church was first established the minister of the parish was entitled to the grazing of the Church yard; that the turf cut off the graves was sufficient to cover it (*sic*) afresh. He declares in presence of his Maker that he has not kept any swine for several years; and that it has been the practice from time immemorial, from Mr. Boston’s time and prior to it, for the Minister’s cows to graze in the Church yard; and that it would be better to annihilate the Church at once than allow the ministers to be trampled on by their parishioners.”

The judgment (in Sir Walter’s handwriting) was this:—

“SELKIRK, 18th May 1810.—The Sheriff-Substitute having advised with the Sheriff-Depute, Finds that no length of possession can give right to the parishioners to cut sods in the Church yard, a practice contrary to decency and the established laws of

the country, which give the grazing thereof to the Clergyman; Therefore continues the interdict¹ with certification² that, if it is transgressed, he will impose a suitable fine.

“(Signed) CHARLES ERSKINE.”

Sometimes the good Homer nods. Shiell had no right to cut the turf; but, on the other hand, it would seem that Mr. Paten had no right to allow his cattle to graze in the churchyard. This was then the law, and it is the law to-day. Some thirty years before the date of this judgment two heritors in the parish of Arngask brought an action before the Sheriff of Fife against Andrew Williamson, minister of the parish, to have him “decerned to desist from pasturing his cattle in the churchyard in all time coming.” The Sheriff found “That he was only entitled to cut the grass in the Church yard, but not to pasture his bestial thereon.” The minister appealed to the Supreme Court, by a Bill of Advocation, in which he alleged that it was the general practice over Scotland for ministers to feed their cattle in the churchyard; but the Court of Session refused his appeal.³ As I have said, the law on this subject remains in the same position at the present time.⁴

The informal character of the initiation of legal proceedings in this case of Ettrick churchyard will be noted. On a mere letter addressed to the Sheriff by the minister, and a defence in the same form, the Sheriff-Substitute pronounced a decree of *interim* injunction, and Sir Walter ultimately made this injunction perpetual.

¹ The Sheriff-Substitute had granted *interim* interdict.

² *I.e.* the assurance that a certain course will be followed on failure to comply.

³ *Hugh Hay v. Andrew Williamson*, 2nd December 1778, Mor. 5148.

⁴ Rankine, *Land-Ownership in Scotland*, 4th edit. p. 191.

THE NEW MANSE OF ETTRICK

Within two years from the conclusion of the *Ettrick Churchyard* case¹ the minister of Ettrick again went to law. This time it was about the site of a new manse.

The existing manse "having been declared unfit for his accommodation, it was agreed upon between the Heritors, the Presbytery of Selkirk, and the Petitioner, that a new one of certain dimensions should be built upon the Glebe, the mason work of which was contracted for and undertaken by John, Thomas and Andrew Thomsons, Masons at Millfield." Mr. Paton² represented to the Sheriff that though he ought to have been consulted in fixing the situation of the new manse, and considered "that with the concurrence of the Presbytery the choice of it lay with himself as a matter of right, Yet Notwithstanding Whereof The Heritors have most improperly taken it upon them to point out the situation of the Manse themselves, which they have fixed not only in direct opposition to the Petitioner's views, and against his remonstrances (he having pointed out one much more convenient and Eligible which they refused to adopt), and which, if acquiesced in by the Petitioner, will not only cut up in the approach to it some of his best land, but the situation in itself is also objectionable, by being placed in a morass which must keep the Manse always damp and unhealthy." He, therefore, presented a petition (from which this statement has been quoted) craving the Sheriff to order that it should be served on Andrew Henderson, Esquire, of Midgehope, one of the nearest heritors, in name of the heritors of the parish, "And in the meantime, not only to interdict, Prohibit and Discharge" the heritors and contractors "from proceeding further with the Building in the present situation, but also to ordain the said Heritors and Contractors instantly to proceed to erect the new Manse upon the spot pointed out by the Petitioner, and to find them liable in the sum of Fifty pounds

¹ *Supra*, p. 29.

² His name is spelled Paton and not Paten on this occasion.

Stg. in name of damages for having improperly cut up and injured his Glebe. Together also with the expenses of this application, Acts and Warrants to follow hereupon." As we have already gathered from the *Churchyard* case, this reverend litigant was nothing if not forceful, and, with Mr. Alexander Park for his solicitor on this occasion, the combination was one which was not likely to pitch the minister's case too low.

Mr. Andrew Henderson of Midgehope lodged answers for the heritors, which were signed by Mr. Robert Henderson, writer, as agent for them.

"In the outset of these answers," they state, "the Respondents cannot avoid expressing their surprise at the appearance and tenor of the present application which (with much deference to the Revd. Gentleman who brought it forward) they consider as highly improper and unnecessary: and in which idea they humbly presume they will be supported by your Lordships Interlocutor, on a fair and candid statement of the circumstances of the case. The Petitioner's present Manse having been a considerable time ago deemed insufficient for his accommodation the Respondents as Heritors of the Parish most readily agreed to build him a new one of such a size and dimension as they thought in every respect suitable to his views and situation—upon a plan, however, of such a manse being laid before the Petitioner, he would by no means agree to take it and insisted on having one on a much larger scale. After a variety of unnecessary meetings and correspondence on the subject, and when he saw that the Heritors were determined to reject the plan which he had proposed as much too expensive, he resolved to bring the matter before a meeting of the Presbytery for the purpose of their deciding upon the extent of the Manse the Heritors should build to him; and the Presbytery having convened at Selkirk in the month of April last, The Respondent Mr. Henderson, in name of the Other Heritors of the Parish attended and produced to the meeting the plan of a manse which had been as before mentioned, approved of by the Heritors, which plan the Presbytery after inspection, unanimously sustained, striking off from it some ornamental free stonework, which they considered as superfluous and unnecessary and recommended to the petitioner to hold himself satisfied therewith. In this decision the petitioner acquiesced, and subscribed a docquet upon the back of the plan approving of it.

"This point being settled the Heritors gave orders to their Clerk to

intimate said plan to tradesmen, and to receive in estimates for undertaking work, which was accordingly done, and they of this date (1812) in consequence of intimation made by the Petitioner from the pulpit met at Selkirk in order to take into consideration the different estimates from tradesmen for building the intended New Manse, conform to the plan approved of by the Presbytery; At which meeting the petitioner was present; and the following minute was taken:—‘There were laid before the meeting six estimates, and which having been examined, they preferred that of John Thomson, Mason in Millfield and John Shiel, wright there, amounting for the whole to the sum of Six Hundred and Fifty six pounds five shillings Sterling, and the *meeting appoint Mr. Ballantyne of Phaap and Mr. Anderson of Stirches to fix upon a proper situation for the said New Manse* and they also recommend to these gentlemen to inspect the work while going on and to appoint Tradesmen for that purpose should they find it necessary. (Signed) ROBT. BALLANTYNE, M. ANDERSON, ANDW. HENDERSON, CHARLES PATON, etc., etc.’ The Respondents beg your Lordships will pay particular attention to the above quotation, which independently of itself, tends to refute every assertion the petitioner has thought proper to bring forward on the point.

“In consequence of this appointment subscribed by the Petitioner’s own hands these two gentlemen attended at Ettrick Manse and after the most anxious and careful scrutiny as to a proper situation fixed on the spot, which the Petitioner has now thought proper to challenge; but which the Respondents are aware, every person who visits the ground will coincide with them, in thinking it is by far the most proper and desirable situation for erecting the said new manse; and they accordingly recommended to the Tradesmen to commence their operations on the situation staked out. The Tradesmen had not however been many days at their work when the Petitioner took it into his head that the situation staked out by Messrs. Ballantyne and Anderson was contrary to his views, and he therefore presented The Petition to your Lordship.”

The heritors then quote from the statements in the petition, and proceed to comment thereon:

“Nothing surely can be more unjust and unfounded, for it is absurd to suppose that the Heritors would build their Manse on a Morass or place it in any improper situation; this idea is altogether incongruous to the interest they have in it . . .; and supposing for instance, the

Petitioner had even gone the length of insinuating that the Respondents had placed the intended New Manse on an unhealthy situation merely from individual Peak (*sic*) against him, what degree of credit would his statement have received in a Court of Justice—certainly none; the interest which they have in it would at once have put an end to this supposition: again if it can be for a moment supposed that the situation of the New Manse is staked out on a morass, as the Petitioner has stated and the situation unhealthy, it may be asked what gainers the Heritors will be by such an Act. The result would be that the very next encumbent in the Parish would call a meeting of the Presbytery, and declare it unfit for his accommodation. From these considerations it must be obvious to your Lordships that the Heritors in the Parish of Ettrick never will be so blind to their own interest as to place their manse on a morass, as erroneously insinuated by the Petitioner. It has been stated by the Petitioner rather triumphantly that with the concurrence of the Presbytery the choice of the situation of the manse lay with himself as a matter of right. This is a doctrine, however, which the Respondents never will subscribe to; in short there is neither Law nor practice to support his pretensions. In a case of so much importance as the present, the right of fixing on a proper situation ought certainly to belong to those who have most interest in the matter. For it is obvious that the situation of the Respondents is different from that of the Petitioner: the one stands only in the character of liferenter; while the interest of the Heritors is permanent, and it cannot be supposed that they would deliberately place their manse on an improper situation, but on the contrary they state to your Lordships that the situation of the manse was fixed in the spot which appeared to the gentlemen who were appointed to do so, as best calculated to promote the Interest both of the Heritors and the Minister and they deny most explicitly that the spot thus fixed upon for the manse will be in any respect more prejudicial to the Glebe than that fixed upon by the Petitioner; indeed it is impossible it can be so, for the one situation is distant only a very few yards from the other. But supposing for a moment that the Petitioner had the exclusive right of fixing the situation of the new manse, which they contend he has not, what claim can he now pretend to have in this respect? He attended the meeting of Heritors at Selkirk on the 11th of May last and appointed ‘Mr. Ballantyne of Phaap and Mr. Anderson of Stirches to fix upon a proper situation for the new manse’: he therefore thus delegated his right in the choice of a situation, if he ever had

any such, to these two gentlemen, and is thereby completely precluded from calling in question their determination. By the Petitioner's application and Interdict no less than twelve workmen have been laid idle, and deprived from proceeding in their contract, and as they intend as the Respondents are informed prosecuting for damages they here hold the Petitioner as liable in the amount of whatever damages may be awarded against them. The respondents shall not trouble your Lordships with any further observations on the questions, for they feel confident that, upon perusing the Minute of the Meeting of the Heritors of 11th May last, herewith produced, authorising two of the Heritors of the Parish to fix upon a proper situation for building the said New Manse, your Lordship will at once perceive the absurdity of the Petitioner's conduct in bringing forward the present application, and will immediately remove the Interdict, dismiss the application and find the Respondents entitled to their full expenses."

The Sheriff issued this interlocutor:—

"SELKIRK, 30th June 1812.—The Sheriff-Depute having considered this Petition and Answers, Appoints the Revd. Mr. Paton to lodge Replies within ten days, and the Respondents to duply within the same space if they shall see cause; Also appoints the Moderator and Clerk of the Presbytery to be served with copies of the Petition and Answers, and of these Answers.

"(Signed) WALTER SCOTT, Sheriff-Dep."

These replies and duplies, needless to say, were lodged; they do not, however, carry the matter any further than the original petition and answer. But a minute of a meeting of the presbytery, held on 17th September 1812, was also put in. This minute bore that the presbytery considered it inexpedient to build the new manse "with its front and back obliquely exposed to the quarters from which the most prevalent and powerful winds blow in this high and stormy part of the country"; and, as regards the site, they preferred the spot immediately behind the old manse, "with the front about 20 feet distant from the back wall." It was to this view of the presbytery that the Sheriff gave effect in his judgment; and, therefore, as in his previous case, the minister of Ettrick carried his point, *i.e.* as regards the site of the manse; but there is no mention of his claim for £50 "in name of damages for having improperly cut up and injured his Glebe."

"SELKIRK, 6th January 1813. — The Sheriff-Depute having resumed consideration of this process, with the Minutes of Sederunt by the Presbytery of Selkirk, Ordains the New Manse to be builded upon the spot preferred by the Presbytery,¹ namely immediately behind the present Manse, with the front about twenty feet distant from the back wall, and further ordains the Gabels of the new building to be opposite to the same quarter of the compass which has been found most convenient in that neighbourhood, and Decerns; and further with respect to the dimensions finds that the same must be ruled by the plan subscribed by the Minister and apparently acquiesced in by the Presbytery, unless the Heritors should of free will choose to enlarge the same, and Decerns. Finds the Heritors liable in expenses and Allows an Account thereof to be lodged.

"(Signed) WALTER SCOTT."

¹ This is in accordance with the decision in the case of *Lochmaben* (i.e. *Steel v. His Parishioners*, 1712, Mor. 8498), where it was held "that the Ministers (i.e. a Committee of the *Presbytery*, as is shown at Mor. 5131), by our law are empowered . . . to choose the most convenient place for the situation of the Manse near the Church." See also Duncan's *Parochial Ecclesiastical Law*, p. 403. Differing from the view of the original author, the editor of the most recent edition of that work (Mr. C. N. Johnston, K.C., Procurator of the Church of Scotland, now Lord Sands) expresses the view (p. 404) that "whilst no doubt the Presbytery may, if the Heritors take no action, designate a site, the initial choice is with the Heritors, and if they offer a suitable site the Presbytery cannot insist on choosing another."

A CASE OF SABBATH-BREAKING

The rigour of the Scottish Sunday in former times is exemplified by the nature of a charge of Sabbath-breaking preferred in the Selkirk Sheriff Court in 1810. "The Procurator-Fiscal of Court for the Public Interest" accused George Merk and John Merk, tenants in Mossilee, and John Merk, Junior, son of the said John Merk, and Robert Anderson, their servants, of having transgressed the laws prohibiting "Profanation of the Lord's day" (Acts 1579, cap. 70; 1592, cap. 124; 1593, cap. 163; 1594, cap. 201; and 1661, cap. 18). It was alleged that "upon the Lord's day, being the seventh day of October 1810, or upon the Sabbath preceding, or upon the Sabbath following, or upon one or other of these Sabbaths, between the hours of eight forenoon and one afternoon, when the Leiges (*sic*) were decently going to Church for the worship of God, the said John Merk, junior, and Robert Anderson did travel with two carts and four horses from Ashkirk Bridge to Mossilee upon the Public Road leading by Greenhill, Whitmuir, and Lindean, in defiance of religion, law, public order and decency, to the great profanation of the Lord's day, and the annoyance and offence of the Leiges."

To this charge the farmers, George Merk and John Merk, lodged written defences, which were signed by Mr. Alexander Park, as their solicitor. "The Defenders are Hopefull," they said, "Your Lordship will be satisfied with the following short state of the Fact, that whatever transgression their Servants may have been guilty of (and they are satisfied also that it was far from being intentional on their part) that at least no blame can attach to them.

"The Defenders sent their servants from Home betwixt the hours of seven and eight o'clock on the morning of Saturday the Sixth day of October last, to travel to Whitfield, a Distance of about Fourteen miles and return to Mossalee that night, which they undoubtedly had sufficient time to accomplish, had they not mistaken their way in Crossing the Muirs, which it appears they did, and wandered a great way from it, which was the sole cause of their servants being so late in returning Home and of the encroachment on the Lord's day."

"If the servants discovered their mistake near any place where they could have left their carts it certainly would have been prudent for them to have done so, but it seems that they conceived they were bound to take home their masters Horses and Carts and it was under the impression of their necessity that they ignorantly committed the crime laid to their charge."

"The Defenders," concludes Mr. Park in his best style, "respect the institution of the Sabbath with Sacred reverence. They are sorry any person under their charge should be charged with a breach of it, at same time they flatter themselves that your Lordship will be satisfied no blame can be attached to their conduct and that they ought to be assoilzied from the Action. They are also hopeful that as the conduct of their servants arose solely from a mistaken notion of the nature of their necessity, which justifies certain actions on the Sabbath day which are otherwise unlawfull, your Lordship will on that account also dismiss them from the conclusions of the Lybell."

In Court, on the 14th November, John Merk, Senior, John Merk, Junior, and Robert Anderson had admitted the facts. Neither this admission, however, nor the written defences just quoted satisfied the public prosecutor. He, in turn, tabled a formal written reply to the defences. "On perusing the present Defences the Defenders disavow any participation in the misconduct of their Servants which they account for through the accidental loss of their way through the Muirs on their way home. Were this account even true, which the Pursuer thinks is rather a little extraordinary, still it can never justify the Defenders in an open breach of the Sabbath-day. The obvious and very common method to be adopted by them was to have loosed their Horses from their Carts, so soon as they discovered where they were, and to bring Home their Horses, and to return for the carts next day.

"The Defenders Anderson and Merk Junr. seem to have been perfectly aware of the Criminality of their conduct, for in place of keeping the public and direct road they returned home with their Horses and Carts across the Country and were met by a great many of the more orderly and better disposed on their way towards Church.

"The Defenders George and John Merk have very improperly attempted to justify their servants. But the Respondent presumes your Lordship will consider this rather to be an aggravation than a paliation (*sic*) of their crime, and that you will decern against the whole Defenders conjunctly and severally for the penalties incurred

by the Servants conform to the conclusions of the Libel, and for the full expenses of the Process."

The Sheriff saw "mitigating circumstances" where the procurator-fiscal failed to find any such; and judgment (in Scott's handwriting) was pronounced in these terms:—

"SELKIRK, 23rd January 1811.—The Sheriff-Substitute having advised with the Sheriff-Depute finds that the Respondents have been guilty of a breach of the Sabbath. But in respect of the mitigating circumstances stated in the Defence the Sheriff modifies the fine to five shillings each and decerns therefore and for the sum of five shillings more as expenses of process against the said John Merk Junr. and Robert Anderson individually and assoilzies the said George and John Merks the said fines to be paid to the Kirk Session of the Parish of Selkirk.

"(Signed) CHA. ERSKINE."

TOLLS

The toll has vanished from off the face of the land—close in the wako of the stage-coach which was wont to flash through its gates. Already a generation has passed along the highways since the soured¹ “tacksman”² removed his bars and his imposts, and disappeared into the unknown, leaving his quaint, observatory-windowed cottage as the only trace of his long and inexorable sway. These tolls certainly had their day. They reigned in romance and story—and in the Courts of Law; and the cases which came before Sir Walter Scott, as Sheriff of Selkirk, give some idea of the wrangles and the irascibility which they provoked.

In 1829 John Croall & Company, coach proprietors in Edinburgh, brought an action against Alexander Govenlock, tacksman, Sunderland Toll-Bar. They claimed damages under the Turnpike Road Act, for his having detained the Royal Independent Stage-Coach, running between Carlisle and Edinburgh. Some quarrelling had occurred between the driver of the coach and the toll-keeper, the latter alleging that the former threw down the toll money in a careless way, and that it was with difficulty that the money was found on some occasions. The toll-keeper's wife one day, in the absence of her husband, shut the gate on the coach approaching, and did not open it until the money was *handed* to her. The Sheriff pronounced the following judgment:—

“SELKIRK, 25th November 1829.—The Sheriff having considered this process, with the proof adduced, finds that it is the mutual duty of the drivers of carriages and the keepers of tolls to transact the payment of the toll duty in such a manner as to be attended with the least possible interruption to the passage of the road; but finds that the pursuers' coach was in the practice of paying the

¹ I call him “soured” on the authority of Mr. Weller, Senior. “Pike-keepers,” says that driver of stage-coaches, “are, all on 'em, men as has met with some disappointment in life. Consequence of vich, they retires from the world, and shuts themselves up in pikes; partly with the view of being solitary, and partly to rewenge themselves on mankind, by takin' tolls.” In his other novels (e.g. *Martin Chuzzlewit*) Dickens represents the toll-keeper as a “crusty customer.”

² *I.e.*, the person to whom the toll is farmed out. A *tack* is a lease.

toll in such a manner as to endanger the loss of the money or else her (*sic*) own personal safety. Finds that the toll-keeper was entitled to prevent this by shutting the gate, being the compulsitor which law has provided for the secure collection of the duty; therefore, refuses the prayer of this Petition, and finds Andrew Govenlock entitled to his expenses. “(Signed) WALTER SCOTT.”

By a reclaiming petition the pursuers appealed to the Sheriff to reconsider his decision. But Sir Walter had made up his mind.

“SELKIRK, 9th December 1829.—The Sheriff-Substitute having advised with the Sheriff-Depute, Refuses the prayer of this Petition, and adheres to the Interlocutor reclaimed against.

“(Signed) W. SCOTT.”

“*Note*.—The Sheriff-Depute having formed his opinion on this case according to the opinion which he has formed on the law and the proof adduced, recommends to the petitioners, if still dissatisfied therewith, to seek redress at a higher tribunal.

“(Intd.) W. S.”

In 1810 George Rodger, the procurator-fiscal, brought a complaint against the keeper of Glendinning Toll-Bar, Walter Scott by name, charging him that he did, “when Nichol Milne, Esquire, of Faedonside, and Charles Erskine, Esquire, Writer in Melrose,¹ who were returning from Hawick on the evening of 7th October 1809, asked for a ticket in order to carry them through the Toll at Selkirk Bleachfield, tell them that they had no occasion for one; and upon their insisting, in place of readily giving one, he detained them about Five minutes sitting on Horseback at the door in a dark night before they could get a Ticket.” “Further he allowed two carts to be left almost close to the Toll bar with their Trams projecting into the road to the danger of the lives of passengers either in the mail coach or other carriages, or on Horseback, Both Contrary to the Act 37 Geo. III. entitled ‘An Act for repealing two Acts made . . . for repairing several roads leading through the County of Selkirk, etc.’”

The following is the interlocutor in the case:—

“SELKIRK, 11th July 1810.—The Sheriff-Depute having considered the Petition, Defences, Proof and judicial admission, fines

¹ The Sheriff-Substitute of Selkirkshire.

and americiates the Defender in one guinea sterling and finds him liable in expenses of process.

“(Signed) WALTER SCOTT.”

In an action in 1808 John Usher, in Toftfield, asked from Thomas Fairgrieve, keeper of Crosslee Toll, repayment of certain toll duties. Usher maintained that his carts should be allowed to pass free if back within twenty-four hours. The toll-keeper, on the other hand, maintained that if the carts “changed their loading” they were liable to be charged anew. He stated that this was the general custom at all the tolls in the county. The Sheriff’s judgment was as follows:—

“SELKIRK (no date).—The Sheriff-Depute having advised this petition, with the Answers, Finds that by the Act, s. 25, tolls are to be paid only once in twenty-four hours, as the marginal title of the Section bears; Therefore finds the Tollkeeper liable in repayment of the duties exacted from the petitioner and his servants in the manner complained of and allows a condescendence thereof to be given in; finds him also liable in expenses of this petition and what has followed thereon, but in respect of the general error imposes no further penalty upon him.

“(Signed) WALTER SCOTT.”

It was not always the toll-keeper that was in fault in the matter of charges. Helen Waters, keeper of Howden Potburn Toll, brought an action against John Anderson, Ettrickbridge, and his servants, suing for 1½d. of toll duty for a cart of lime. The defender’s servant alleged that the lime with which the cart was loaded was to be laid upon the land, for fertilising purposes, and that therefore the cart was entitled to pass free of toll-duty; while the pursuer contended that the lime was to be used for building purposes, and that the defender was therefore liable in the duty sued for. The Sheriff decided the matter thus:

“SELKIRK, 4th September 1805.—The Sheriff having considered this process, finds that although there seems to have been no actual intention of fraud on the Defender’s part, a false allegation was made by his servant; Therefore finds him liable in the mitigated penalty of five shillings, and in expenses of process, modifies the same to ten shillings, and decerns.

“(Signed) WALTER SCOTT.”

There were two actions arising out of the events of the morning of St. Boswells Fair in 1811.

The first of these was directed against Mr. Alexander Laidlaw, son of Mr. Robert Laidlaw, farmer at Philiphaugh, by Thomas Govinlock,¹ tacksman of Selkirk Toll. For the purposes of the Fair day, Govinlock had put up a temporary toll-gate near the east end of the burgh of Selkirk. He alleged that on the morning of 18th July 1811 Mr. Alexander Laidlaw, "having come upon horseback to the said bar on his way to St. Boswells Fair, rode or lept over the said bar so quickly as not to give the complainer time to demand the exact toll from him, although he was then standing in waiting for that purpose; and on his way home from the fair in the evening he again passed through the Bar without paying the Toll demanded from him." In the complaint, therefore, Govinlock claimed threepence sterling as the toll duty, and twenty shillings as penalty for the morning's contravention, and twenty shillings as penalty for the evening's contravention of the local statute of 1807. The defence was that the right to erect these temporary gates was denied; and that the defender was under age, and that his father was being prosecuted for precisely the same offence. Mr. Laidlaw, Senior, appears in the next case, but the complaint against him was not proceeded with. The interlocutor in the case against his son was:

"SELKIRK, 8th January 1812.—The Sheriff supersedes consideration of this case until the interlocutor becomes final in the leading case of *Govinlock* against *Park* by which this will be ruled.

"(Signed) WALTER SCOTT."

Apparently this case was dropped after the proceedings in *Govinlock* v. *Park* were concluded.

The case of *Govinlock* against Mr. George Park, farmer, Carterhaugh, raised the same question, viz. the right of the toll-keeper of Selkirk Toll-Bar to erect temporary toll-gates on St. Boswells Fair day. The complaint alleged that "on the morning of 18th July, having come up on horseback to the said Bar on his way to St. Boswells fair, he refused to pay the Toll duty on the same being demanded from him by the complainer, and passed through the bar without paying; and on his return, with Mr. Robert Laidlaw and another man unknown to the

¹ This name is spelled indiscriminately Govenlock and Govinlock. These Govinlocks seem to have had almost a monopoly of tolls.

complainer, the said George Park not only refused to pay the Toll duty on the same being demanded from him by the Complainer's sister, . . . but, having alighted from his horse he took down the bars, and, going himself, called also to the said person before mentioned, who was leading eight horses, to follow him and not to pay, as the said complainer and his sister had no right to exact Toll there, and the said person influenced by his example and advice refused to pay the Toll and passed through."

The following interlocutor, with note, was pronounced by Sir Walter Scott, and is written by himself:—

"*SELKIRK, 8th January 1812.*—The Sheriff-Depute having considered the summons, with defences and answers, finds that the road act founded upon does not confer, either expressly, or by fair implication, the power of erecting bars of a temporary nature for the purpose of levying toll upon a particular day on a road which is at all other times suffered to remain open; therefore assoilzies the defender from the conclusions of the libel, finds the pursuer liable in expenses, and allows an account thereof to be lodged.

"(Signed) WALTER SCOTT."

"*Note.*—As the present is a point of great general importance, the Sheriff-Depute is desirous that the grounds of his judgment should be distinctly understood. It seems to him, not only that the power of the trustees is a creature of the Statute, and must therefore be strictly regulated by the words thereof, all of which seem to relate to tolls of a permanent nature, with bars properly fixed, and tables of the duties exposed to the public, but also, that the privilege of levying a certain tax being devolved upon trustees, though for a purpose highly useful to the public, it ought to be carried into effect with such an appearance of regularity and authority as shall put the lieges upon their guard and apprise them that the collector of the toll is duly empowered to levy the same. The Sheriff has no doubt that the mode adopted by the Trustees in the present instance may be abstractedly a more convenient mode for the public than fixing a permanent bar upon the spot in question, and he has little doubt that the defenders, in this and similar questions, knew that the Trustees had empowered the pursuer to levy the toll in question on the day of St. Boswells; and perhaps they might have acted with more wisdom, at least

with more urbanity, in taking some other way of impeaching the authority of the trustees than that which they have chosen; but it is the business of a Judge to look at the law of the case only, and the Sheriff gives the present decision with the less reluctance, because it is impossible for the Trustees, where they delegate their powers to the description of persons usually employed in such duty, to give them at the same time their own sense of discretion and propriety in the exercise of them, whence it must frequently happen that the more loose, vague, and discretionary the powers trusted to them, the more frequently disputes are likely to arise out of attempts at imposition on their part, or of resistance or pertinacity on that of the passengers.

“(Intd.) W. S.”

The pursuer appealed, by reclaiming petition, to the Sheriff to reconsider his judgment. The following interlocutor, in Scott’s handwriting, was pronounced:—

“SELKIRK, 26th February 1812.—The Sheriff-Substitute having advised with the Sheriff-Depute, refuses the prayer of this petition, and adheres to the Interlocutor reclaimed against.

“(Signed) CHARLES ERSKINE.”

The toll-keeper, or perhaps the Road Board at the back of him, was not satisfied. He appealed, by Letters of Advocation, to the Court of Session. The case came before Lord Balgray,¹ as Lord Ordinary, who had but recently been promoted to the Supreme Bench. He pronounced an interlocutor (20th June 1812), in the course of which he ordained the defender, George Park, by a writing under his hand to confess or deny—Firstly, whether or not in any former year he ever paid toll at the foresaid bar when temporarily erected and posterior to the period when a permanent bar was placed at a greater distance from the burgh of Selkirk. Secondly, whether or not, previous to his passing the temporary gate on the day in question, he was informed by any person or persons that such temporary gate was erected. Thirdly, whether or not at the time when he passed the said toll-bar and refused to pay, he “encouraged any other person or persons to follow his example.” Park by minute (1) denied that he had ever paid toll-duty on any previous occasion at this temporary bar;

¹ David Williamson of Balgray.

(2) stated that he was not informed, nor did he know, that such temporary gate was erected; and (3) denied that he had encouraged anyone to pass the gate without paying.

The pursuer, under a similar order, admitted that Park, after he was cited in the Sheriff Court, made offer to the pursuer to pay the toll duty and statutory penalties.

On 5th July 1812, proceeding on these admissions and denials, Lord Balgray remitted "the cause *simpliciter* to the Sheriff; and in respect the defender, George Park, did offer after citation in the process before the Sheriff to pay the Toll claimed and the statutory penalty which was refused, Finds him entitled to his expenses."

REFUSAL TO SUPPLY POST-HORSES

Another echo from the roads of these days reaches us in a case of 1806, in which Sir John B. Riddell asked the Sheriff for damages against James Dun, vintner in Selkirk, and also to find the defender liable in the penalties imposed by Acts of Parliament, for refusing to supply post-horses for longer than one day. After a proof, the Sheriff pronounced this judgment, which concisely explains the circumstances :—

“SELKIRK, 28th May 1806.—Having considered the proof for both parties, In Respect it appears that Sir John B. Riddell's servant said the horses were wanted for three or four days when he first came for them, and also that there was a great run upon the road at the time, finds that James Dun was *in hoc statu* entitled to decline to job the horses: Therefore Dismisses the Complaint, and finds Sir John B. Riddell liable in expenses and Allows an Account to be given in.

“(Signed) WALTER SCOTT.”

THE SEQUEL TO A WEAVER'S WEDDING

Robert Brown, a weaver in Galashiels, with the concurrence of the procurator-fiscal, took proceedings against James Haig, likewise a weaver there. The pursuer complained that the defender carried off a table which was used on the occasion of the private complainer's wedding, and which had been "temporarily placed to the door to make room for the dancing inside, and not only broke and destroyed the same, but abstracted from a drawer therein a number of articles, including a fly shuttle, a hand shuttle, a bairn's mutch,¹ a soap box and razors, a piece of striped cotton cloth, etc., etc., and burnt the same in the house of James Henderson; and further that the defender was guilty of a riot and breach of the peace by insulting and attacking the women and others who were returning from the wedding, and by parading the streets of untimeous hours with a lighted candle in his hands." They concluded for payment of £1, 10s. to the private complainer for the loss of his property, and £10 to the procurator-fiscal, as the defender had been guilty of riot and breach of the peace.

Haig denied the charges. In his defences he went on to say, "This much is certain, and the Defender offers to prove, that the Bridegroom himself and several others at the wedding were very much intoxicated, and behaved in a very rude and riotous manner. The private complainer² *damned* his own father who was present, and threatened to knock down those who endeavoured to appease him." He suggested that the table might have been broken by "this company themselves" in carrying it out and in, "or by the children and others who had gathered about the door, or had been attracted by the noise and riotous conduct of the marriage company."

The Sheriff allowed a proof; and thereafter, he issued this interlocutor:—

"SELKIRK, 28th August 1811.—The Sheriff having advised the

¹ A cap, a head-dress for a woman.

² *I.e.*, be it noted, the bridegroom.

proof and whole process, finds the Defender liable for the value of the property which it appears he wantonly destroyed; Modifies the same to half a guinea and decerns for the same, also finds expenses due, but assoilzies him from the criminal conclusions of the libell.

“(Signed) WALTER SCOTT.”

PLOUGHMAN'S ACTION FOR WRONGOUS DISMISSAL

Thomas Drydon, late servant to Thomas Arras, tenant in Megal Pots, sued Arras for a half-year's wages, averring that he had been wrongfully dismissed. In his defences Arras stated that he found the pursuer "to be one of these servants whose turbulent Disposition suffered him not to be at peace with his master, his fellow-servants, or even the Horses he worked with. His behaviour has been the subject of challenge and vexation to the Defender, and complaint from the Defender's housekeeper and other servants, which places the master in a situation so very uncomfortable as can hardly be tolerated by any Gentleman of spirit." He condescended on instances of insolent behaviour. The action was a protracted one. Beginning in October 1808, it did not end until July 1812. The delay occurred over the proof. A proof was allowed by the Sheriff-Substitute, and we find him by interlocutor of 19th February 1812 ordering the proof to conclude. By an interlocutor in his own handwriting Sir Walter Scott disposed of the case thus:—

"SELKIRK, 22nd July 1812.—The Sheriff-Depute, having advised this process with the proof adduced, finds that the Defender has failed to prove the ill-usage of his horses set forth in his defences: finds further that although the conduct of the pursuer upon one other occasion seems to have been pert and uncivil, yet it was not so much so as to infer a confiscation of his whole term's wages, as he expressed himself willing to enter on work the Monday after the altercation took place: Therefore finds the Defender liable in payment of the nine pounds ten shillings concluded for, and Decerns for the same and interest: Finds expenses due, and allows an accmpt to be given in.

"(Signed) WALTER SCOTT."

THE SHERIFF "PERAMBULATES THE MARCHES"

An action was brought in the Selkirk Sheriff Court in 1808 by Mr. J. R. Johnstone of Alva, as to building a march dyke between the lands of Lewinshope, belonging to him, and the lands of Broadmeadows, belonging to Mr. John Boyd, and also as to fixing the line of march. The several deliverances will be found in the Appendix (No. 22). But the first interlocutor must be quoted here. It may be purely accidental, but it seems as if in this deliverance, alone of all those he issued, Sir Walter "lets himself go" (to use a colloquial expression), as Monkbarns would have done had he had the good fortune to stumble on such an opportunity. The interlocutor runs:—

"SELKIRK, 17th August 1808.—The Sheriff-Depute, having considered the Report, Objections, and Answers, Agreeable to the request of the Objector, will visit and perambulate the marches in presence of the parties, and for that purpose appoints parties to meet him at Penmanscore upon Monday the twenty-second current at eleven o'clock forenoon.

"(Signed) WALTER SCOTT."

Now is this not worthy of *The Antiquary*? In one and the same brief interlocutor he has in his ears the jingle of an old Scottish ballad and the ring of an ancient legal phrase. In a legal sense, the step which Sir Walter projected was not, strictly, a "perambulation of the marches"¹ at all, but the word "perambulate" he could not resist, and so he adds it to the unassuming "visit," and gives an atmosphere of importance and antiquity to the proceeding. It is difficult, too, not to feel assured that while he wrote the words fixing this trysting-place the author of the *Minstrelsy of the Scottish Border* was repeating the refrain of the old ballad:—

¹ Which was a formal proceeding on a breve of perambulation, with a formal inquest of men "with land of their own, and that dwell maist ewest (*i.e.* nearest) the controverted marches" (Act 1579, cap. 79; Stair, *Institutes*, bk. iv. tit. 3, s. 14).

Desyre him mete thee at Penmanscore,¹
 And bring four in his companie ;
 Five erles sall gang yoursell befor,
 Gude cause that you suld honour'd be.

Bid him mete me at Penmanscore,
 And bring four in his companie ;
 Five erles sall cum wi' mysell,
 Gude reason I suld honour'd be.

He bids ye meet him at Penmanscore,
 And bring four in your companie ;
 Five erles sall gang himsell befor,
 Nae mair in number will he be.

Some years later (in 1813) Mr. Johnstone of Alva brought an action to have his boundaries fixed where his lands marched with those of the Earl of Traquair along the top of Minchmoor or Minchmuir. (See Appendix, No. 73.) In that case Sir Walter "appointed the proof to proceed on the ground," granted diligence to both parties for citing witnesses, and "perambulated the March in question in presence of the parties' procurators."

When one reads Sir Walter Scott's final judgments in these two cases respectively (see Nos. 22 and 73 in Appendix), in which he fixes the line of march, one cannot help hazarding the conjecture that they suggested the description given by Dandie Dinmont (in *Guy Mannering*, published about sixteen months later) of the dispute as to marches between himself and Jock o' Dawston Cleugh. "Ye see we march on the tap o' Touthop-rigg after we pass the Pomoragrains; for the Pomoragrains, and Slackenspool, and Bloodylaws, they come in there, and they belang to the Peel; but after ye pass the Pomoragrains at a muckle great saucer-headed cutlugged stane that they ca' Charlie's Chuckie, there Dawston Cleugh and Charlie's Hope they march. Now, I say the march rins on the tap o' the hill where the wind and water shears; but Jock o' Dawston Cleugh again, he contravenes that, and says that it hauds down by the auld drove-road that gaes awa by the Knot o' the Gate ower to Keeldar-ward; and that makes an unco difference."²

¹ Penmanscore is a remarkable hollow on the top of a high ridge of hills dividing the valley of Tweed from that of Yarrow, a little to the east of Minchmuir.

² Chap. xxxvi.

A CASE OF ABSTRACTED MULTURES

Thirlage, treated in Scots law as a servitude or easement, was an obligation under which the occupiers of specified lands were astricted to a particular mill. In other words, they were bound to have their grain ground at the mill of the thirl. It was a trade monopoly. When a landlord embarked on the expenditure of erecting a water-mill, in order to secure an adequate return for his outlay through the rent of the mill he required all his tenants to bring their grain to be ground there, and prohibited the use of querns or hand-mills.

Thirlage came to bristle with a formidable terminology of its own. Thus the area astricted to the mill was called the *thirl* or *sucken*, and those in possession of the lands astricted were the *suckeners*. The dues for grinding, paid in kind, were termed *multures*. Multures paid by the suckeners were called *insucken* or *in-town*, while those paid by strangers were denominated *outsucken* or *out-town* multures. *Sequels* were payments due to the servants of the mill, such as *bannock*, and *lock* or *gowpen*. *Knaveship* was due to the under-miller. When a suckener took his corn to be ground elsewhere, he was liable to the mill of his thirl in *dry multures* and so forth. In *The Monastery*¹ Sir Walter Scott contrives to introduce practically all these terms into a brief and somewhat artificial part of a dialogue between Elspeth and Hob Miller. In *The Pirate*,² too, there is a similar conversation between Triptolemus Yellowley and his sister, in which most of these terms again make an obtrusive appearance.

Sir Walter had a thirlage case before him in Selkirk Sheriff Court in 1808. Mr. James Pringle of Torwoodlee, and William Neil, his tenant in Newmilns, brought this action against George White, Caddonlee and Fairnalee. By his lease the defender had bound himself to grind all the corns he should use for his family at the mill at Newmilns. The pursuers complained that, notwithstanding

¹ Chap. xiii.

² Chap. xi.

this obligation, the defender abstracted from the said mill all the corn used by him and his family; and although the said William Neil required the defender to make payment to him of the ordinary multures, sequels, and knaveship of the corns and grains so abstracted, he refused to do so. The first interlocutor, in Scott's handwriting, was this:—

“SELKIRK, 23rd March 1808.—The Sheriff-Substitute having advised with the Sheriff-Depute, finds the defender has subjected himself in damages for abstracted multures, since the law of Thirlage, though no favourite of modern practice, cannot while existing at all be made the subject of manifest evasion; therefore Appoints the defender to lodge a Condescendence of the extent of his abstraction as concluded in the libell.

“(Signed) CHARLES ERSKINE.”

This the defender failed to do; and a fresh order was made on him:—

“SELKIRK, 17th August 1808.—The Sheriff-Depute renews the former order for lodging a condescendence, under certification that, if it is not complied with, he will decern in terms of the libell.

“(Signed) WALTER SCOTT.”

A condescendence was not lodged, and the defender presented a reclaiming petition. Following on this, the final judgment (in Scott's handwriting) was in these terms:—

“SELKIRK, 28th June 1809.—The Sheriff-Substitute having advised with the Sheriff-Depute, In Respect the defender has failed to shew by Condescendence that he has implemented the terms of his lease, Refuses the petition, finds him liable in Ten pounds sterling as the modified value of the abstracted multures, and also in expenses.

“(Signed) CHARLES ERSKINE.”

A SUCCESSFUL RECLAIMING PETITION

In one instance at least reclaiming petitioners were successful in their appeal to the Sheriff to alter his judgment. Apparently in their appeal they brought under his notice a decision to which his attention cannot have been called when he pronounced his earlier judgment.

John Davidson, residing in Edinburgh, presented a petition to the Sheriff in 1809, in which he showed "That his son William enlisted in the Royal Artillery, leaving his wife and three children a burden upon the petitioner; that he was unable to support them; that he had made application for the support of the children to the three parishes where they were born, vizt. Lauder, Duns and Galashiels; that the two former parishes had enrolled the two children in the Poor's Roll of their respective parishes; but that the parish of Galashiels refused to allow anything for the support of the child born there, in respect the parents had not resided three years in that parish before the child was born." In support of his claim Davidson referred to a case decided in the Supreme Court—*The Heritors of Melrose and Stitchell v. The Heritors of Bowden*.¹

The following interlocutor was pronounced:—

"EDINBURGH, (*sic*) SELKIRK, 22nd March 1809.—The Sheriff-Substitute having advised with the Sheriff-Depute, finds that the Heritors of the parish of Galashiels are liable in the maintenance of William's (*sic*) Davidson's second child; Therefore Decerns in terms of the libel, and finds expenses due.

"(Signed) CHARLES ERSKINE."

The heritors reclaimed by petition, and this interlocutor was pronounced:—

¹ (24th January 1786, Mor. 10584), in which it was held that the parish of birth was liable in the support of poor children who had not resided three years in any other parish, although their father had at one time been resident for that length of time in another parish, but had left it some years before his death.

"SELKIRK, 14th March 1810.—The Sheriff-Substitute having advised with the Sheriff-Depute, as the point of law is of some consequence, Allows the petitioner to state his plea on the merits in a reclaiming petition. “(Signed) CHAS. ERSKINE.”

"*Note.*—The Sheriff-Depute requests all questions of form may be decided by the Sheriff-Substitute either *instanter*, or, should he think proper, by short minutes to be advised by the Sheriff-Depute. The inconvenience and expense arising from long written pleadings upon a mere point of form is sufficiently obvious, especially in such a case as the present."

The heritors lodged another reclaiming petition, to which answers were made, and the following interlocutor was issued :—

"SELKIRK, 8th August 1810.—The Sheriff having advised this petition and answers, in respect of the later practice of the Supreme Court,¹ Alters the Interlocutor reclaimed against, finds that the parish where the pauper's father last had a settlement is liable in support of his family, Therefore Assoilzies the Heritors of Galashiels parish from the conclusions of the Summons, and Decerns, but finds no expenses due.

"(Signed) WALTER SCOTT."

¹ Presumably reference is here made to the case of *Howie and Kirk-Session of Alyth v. Kirk-Session of Arbroath and St. Vigeans* (25th January 1800, Mor. App. voce Poor, No. 1), which had decided that the settlement of a legitimate child was determined, not by the place of his birth or residence, but by the residence of his parents.

THE SALE OF A GARDEN, REDEEMABLY

On 7th July 1801 William Rodger, hosier in Selkirk, "sold" to Alexander Cunningham, residenter there, his garden, lying to the south of the churchyard, for £29. The terms of the transaction were that the garden was to be redeemable by Rodger at any time within three months, on his retiring a bill at the Bank of Scotland which Cunningham had signed. Rodger did not redeem the garden or retire the bill within three months, or, indeed, within three years; and in 1804 Cunningham raised an action to have Rodger ordained to execute a disposition of the garden to him, or, alternatively, to make payment of £20.

Judgment was given in these terms:—

"SELKIRK, 31st *July* 1805.—The Sheriff having considered the process, Dismisses the Summons on the first conclusion as incompetent before this Court; on the alternative conclusion finds the Defender liable in payment of Twenty pounds Sterling, with interest from and since the 7th July 1801, Finds him farther liable in expenses of process, modifies the same to half a guinea and Decerns.

"(Signed) WALTER SCOTT."

There is no further step in the process for nearly five years. In 1810 Rodger lodged a "Counter Lybell." His counter-claim, he said, was in an "account, which will to a trifle (*sic*) extinguish and pay" the sum of £20 decerned for five years before. The amount of this account was £18, 8s., and it had been incurred mainly for "the use of apartments." This account had been founded on by Rodger in his original defences. Cunningham pleaded prescription. This plea was repelled in the following judgment (written by Scott, though signed by Erskine):—

"SELKIRK, 14th *March* 1810.—The Sheriff-Substitute having advised with the Sheriff-Depute, Repells the Defence of Prescription in respect of litigiousity, and ordains the Defender in the counter claim to lodge Defences *in causa*.

"(Signed) CHAS. ERSKINE."

This note is added, also in Sir Walter's handwriting:—

"*Note.*—In this as in another process the Sheriff desires that the pro^{rs}.¹ will confine their pleadings to law or fact, stating points of form verbally to the Sheriff-Substitute."

Cunningham appealed to the Sheriff, by reclaiming petition, to reconsider this judgment as to prescription. This is disposed of in an interlocutor and note written by Sir Walter himself:—

"SELKIRK, 11th July 1810.—The Sheriff-Substitute having advised with the Sheriff-Depute, Refuses the prayer of this Petition, and adheres to the Interlocutor reclaimed against.

"(Signed) CHAS. ERSKINE."

"*Note.*—The Sheriff-Depute should hardly have thought it necessary to inform the gentleman who signs this petition that *litigiosity* in the Scottish law only signifies generally that the subject has been agitated in a Court of Justice, as in the present case by the Respondent founding upon this account in his original defences within the three years, which appears to the Sheriff sufficient to remove the presumption of the Statutory prescription against its being resting owing."²

This action went no further. Presumably it was settled extrajudicially.

¹ Procurators, *i.e.* solicitors.

² "The gentleman who signs this petition" was Mr. Alexander Park. It is obvious, however, that this was not a correct use of the word "*litigiosity*." Its operation is not in the realm of prescription. In this use Sir Walter held, in effect, that by being pleaded in a defence within the three years, the debt on the account was "*persewed within three zeires*" in terms of the statute, which would otherwise have limited the mode of proof.

DISPUTE BETWEEN EMPLOYER AND WORKMAN

A curious story was told by one Alexander M'Kenzie, "plaisterer" in Gattonside, in an action which he raised (14th November 1810) against his employer, John Hall, "plaisterer" in Selkirk, to recover £3, 16s. of wages. M'Kenzie said that he had been engaged by Hall on 22nd June 1810 to work as a journeyman with him. His remuneration was to be 15s. per week, "besides Bed and Board in a decent manner, wages being to be cleared off every month, and the complainer to be supplied with subsidising money." According to M'Kenzie, at 12th September Hall was owing him this sum of £3, 16s., and "the said John Hall having then desired the said complainer to make out his accounts for each month separately, he snatched from the complainer the discharged accounts for the month ending 7th August without having paid him the balance due thereon, being £1, 1s." The remaining £2, 15s. was for work between 7th August and 12th September, when M'Kenzie left his service.

In his defences to this action Hall denied that he was owing one farthing of pursuer's wages preceding 12th August. "The story recited in the libel," he averred, "is a gross falsehood." It was very improbable that pursuer would have continued "nearly a full month" after the defender was said to have committed such a violent and improper act. One may pause to point out that M'Kenzie alleged that this incident of the snatching of accounts took place on 12th September, and accordingly he did not continue in the defender's service thereafter. Hall produced the discharged accounts. He also brought a counter-claim against M'Kenzie for damages for desertion on 8th September, "without giving complainer the usual and proper intimation of his intention, or assigning a just reason for his so doing, and when he was engaged in finishing a job," which required to be instantly finished, "to his great loss, hurt, and prejudice."

There were, of course, answers and replies. But these do not throw any further light on the facts. The Sheriff decided the matter by the following interlocutor (in his own handwriting):—

"SELKIRK, 16th September 1811.—The Sheriff-Depute, having advised the original Summons and Counter libel, conjoins the processes; and on the original question finds the Defender liable in the admitted balance of Two pounds twelve shillings and sixpence, and Decerns; but assoilzies *quoad ultra*, in respect of the written discharge produced, which can only be set aside in a regular action of reduction on the grounds of fraud or violence; Finds the Counter libel incompetent in respect of the missive of Agreement containing no stipulation as to warning or date of service, Therefore Assoilzies Alexander M'Kenzie from the conclusions of the said Counter libel; finds the pursuer¹ liable in expenses, Modifies the same to seven shillings, and Decerns.

"(Signed) WALTER SCOTT."

¹ This must be the "pursuer" in the counter-libel, i.e. Hall.

A SUBSCRIPTION TO THE SELKIRK MASONIC LODGE

In the year 1817 George Young, saddler, and others, sued Ebenezer Clarkson, surgeon, for £10, being the price of two shares subscribed by him towards the building of a Masonic Lodge in Selkirk. The defender pleaded that there had been a departure from the original plans, and that he had not been consulted in the matter. Sir Walter Scott pronounced judgment as follows:—

“SELKIRK, *20th August* 1817.—The Sheriff-Depute having advised the Summons, with defences and Answers, in respect that the proceedings respecting the plan and execution of the proposed lodge were of a public nature, and that it is not alleged that the Defender stated any objections to the plan finally adopted or that the said plan is inapplicable to the purpose for which the subscription was made, namely, that of a suitable mason lodge, Finds the Defender liable in payment of Ten pounds sterling, and in the expenses of this process.

“(Signed) WALTER SCOTT.”

SEARCH FOR COAL AROUND SELKIRK

We catch a glimpse of an enterprising but fruitless venture in the brief record remaining of an action in the Sheriff Court in 1817. James Leitch, wright (*i.e.* carpenter) at Lindean Mill, sued Mr. Robert Henderson, writer, Selkirk, as treasurer of a committee appointed at Selkirk to search for coal around the adjacent country. Leitch's claim was for £3 for wright work, and £5, 10s. 2d. for smith work, in connection with operations ordered by the committee. In defence Mr. Henderson pleaded that he had no funds, and that there had been no employment.

The following was the judgment :—

“SELKIRK, 3rd September 1817.—The Sheriff-Depute having advised this process, finds Mr. Henderson *qua* Treasurer liable in payment of the within mentioned sums of Five pounds and three pounds 10/2 (*sic*) with expenses of process, and Decerns, and ordains Mr. Henderson to exhibit the original subscription paper that it may appear what subscriptions are outstanding; But supersedes¹ all personal diligence² against Mr. Henderson in respect he has no funds in his hands at present.

“(Signed) WALTER SCOTT.”

¹ Stays. Cp. *supersedes* in English law.

² *I.e.* all process of law by which Mr. Henderson's *person* might be attached in order to carry the judgment into effect. Probably, however, what Sir Walter intended was not this grammatical meaning of his words, but rather “stays all diligence against Mr. Henderson *as an individual*.” It is unlikely, in the circumstances, that he intended to leave Mr. Henderson's *property* attachable for a debt of this nature.

A FIARS COURT FOR SELKIRKSHIRE

“Fiars Prices” are the standard prices of grain fixed for the year by the Sheriff. The purpose of so fixing or “striking” these prices is to settle the rate at which the stipends of the clergy, payable in grain, are to be converted into money; as well as for any other payments which are referable to the current value of agricultural produce.¹

In 1812 certain prominent persons in the county of Selkirk presented a petition to the Sheriff, in which they set forth “that it has been the practice from time immemorial for the Sheriffs throughout Scotland to ascertain the average selling prices of grain within their respective counties by means of an inquest,² which prices so ascertained are called the Sheriff Fiars,³ the use of which was to liquidate the price of victual in diverse processes that came before them and the subordinate judicatories.” After narrating the passing by the Supreme Court of the Act of Sederunt, 21st November 1723, the petition proceeded:—“As the county of Selkirk is chiefly a pastoral country, very little grain was raised in it in former years; but in consequence of the late improvements in Agriculture, and the general spirit of enterprise which has lately prevailed among the cultivators of land, a considerable change has now taken place in this respect, and large quantities of grain are annually raised, particularly in the lower parts of the county.” On this account it had “become desirable that fiars prices should be struck in future in this shire as well as in other parts of Scotland.” “This measure had now become the more necessary in consequence of the late Act of Parliament⁴ regulating the practice of the Court

¹ The term “fiar” here used is not to be confounded with the word “fiar” meaning the owner of heritable property. The two differ in etymology as well as in meaning. “Fiar,” as used here, is identical with the Middle English *feor*, Old French *feur*, a price—a derivative from the Latin *forum* in its sense of a market, and therefore denotes a “market price.” *Cp.* Act 1584, cap. 22, in Record Edition of Scots Acts, iii. 304.

² *I.e.* a jury.

³ In early times the Sheriff was a fiscal officer of the Crown, and it was his duty to fix the rate at which Crown rents payable in grain were to be converted into money. This was the origin of the term *Sheriff's fiar*.

⁴ The Teinds Act, 1808 (48 Geo. III. cap. 138).

of Teinds,¹ by which Act it is appointed that all Ministers' Stipends allocated in Victual shall in future be payable according to the highest fiars prices to be struck within the County."

The signatories to the petition were John C. Scott, W. E. Lockhart, Alex. Pringle, M. Anderson, William Scott, John Boyd, Robt. Ballantyne, Geo. Rodger, J. W. Anderson (for the burgh of Selkirk), George Brydon, Crosslee, and James Grieve, Howden.

The deliverance following on this petition is in the handwriting of Sir Walter Scott, and is dated and signed by his Substitute :

"SELKIRK, 30th May 1812.—The Sheriff-Substitute, with advice and authority of the Sheriff-Depute, finds the prayer of this petition reasonable, and Declares that in future the Fiars of the County shall be regularly struck in terms of the Act of Sederunt and of the prayer of the petition, and that the Sheriff will accordingly fix the proper time for striking the fiars of the present year, and appoints this petition and deliverance to be recorded in the Court Books.
"(Signed) CHAS. ERSKINE."

(The procedure at the Fiars Court is to summon a certain number of jurymen, and to select fifteen of these to form the inquest; and also to summon witnesses who have been engaged in selling grain. The members of the inquest also act on their own knowledge of prices. A fee of some guineas is available for the jury. An interesting variance in the manner of apportioning this fee prevails in the Courts in the different counties. In some places the fee is divided among the jurymen in equal sums; in some it is appropriated to the six who chance to be first selected by the ballot; and I understand that in one locality, at least, an "adjournment," is made after the conclusion of the business, and the jurymen draw lots as to which one of their number shall secure the whole sum !)

¹ A department of the Court of Session. Teinds in Scotland correspond to tithes.

A "LOOSE AND IRREGULAR" BILL TRANSACTION

George Mark, tenant in Mossilee,¹ presented a petition to the Sheriff, in which he stated that upon 5th August 1808 he had been prevailed upon by Ebenezer Knox, tenant in Crosslee, to sign as drawer a bill for £30. The bill had been left blank in certain particulars and was to be filled up by Knox. Knox afterwards told the petitioner that he had destroyed the bill. He had not destroyed it, but had made it bear to be for £50, and that the petitioner was acceptor. Knox still retained the bill and "holds the petitioner as debtor" under it. Therefore Mark craved the Court to ordain Ebenezer Knox to undergo a judicial examination in the matter, and to appoint him to deliver up the bill in order that the same might be cancelled; or in case of failure to do this, to find him liable in £100 as the damages which the petitioner might sustain in and through the said Ebenezer Knox having made use of his name in such an improper manner.

The Sheriff disposed of the matter by the following judgment:—

"SELKIRK, 22nd July 1812.—The Sheriff-Depute Ordains Mr. Paterson, Junior, Agent for the Defender, to lodge the Bill in question in the hands of the Clerk of Court not to (be) delivered up by him unless upon authority of the Commissary Court and on proper receipt by their Clerk; and in respect that the Bill if ever discounted must have been regularly retired by the discounteer when due and that it cannot now be made the ground of charge against the petitioner, refuses the prayer of the petition *quoad ultra*, and the whole transaction being of a nature the most loose and irregular finds no expences due to either party.

"(Signed) WALTER SCOTT."

¹ One of the accused in the Sabbath-breaking case, *supra*, p. 37.

FREIGHT AND INSURANCE OF WOOL

In an action brought in 1813, James Kidd, the manager for the Leith and Hull Shipping Company, sued James Cunningham, tenant in Gamescleugh, for £19, 14s. 7d., being for the freight and insurance of wool shipped to Hull from Leith in the pursuer's company's smack. Cunningham admitted being due this sum less £3, 8s. 1d., and he consigned into Court the amount for which he admitted he was liable. In his defences he said that, being himself unacquainted with the mode of carrying wool from Leith to Huddersfield, he applied to his friend Messrs. Grieve & Scott, wool merchants, Edinburgh, to make the necessary arrangements. These merchants got from the pursuer a letter quoting terms, and the defender claimed that this was binding on the pursuer. The pursuer sued for the freight and insurance as ordinarily charged. There were defences, answers, replies, and duplies. In the end, Sir Walter Scott pronounced this judgment (which is in his own handwriting):—

“SELKIRK, *10th November* 1813.—The Sheriff-Depute having advised this process, finds that the letter by the pursuer to Messrs. Grieve as explanatory of the terms on which he transported wool is binding upon him in this action, therefore assoilzie the Defender from payment of the disputed sum of Three pound eight shillings and a penny and decerns, and finds the Defender entitled to his expenses; farther appoints the undisputed balance consigned in the hands of the Clerk of Court to be paid to the pursuer and grants warrant accordingly.

“(Signed) WALTER SCOTT.”

A DEAL IN SHEEP

George Paterson, tenant in Twiglees, sued John Little, tenant in Fairnilee, for £14, the price of sheep sold and delivered. In his defences Mr. Little told this tale. "The fact is that the pursuer brought 39 to Langholm fair, for which he had formerly been offered by a butcher from Moffat 28s. each; but at the fair no person would give more than 25s. The pursuer was on that account rather laughed at by the dealers; and, in order to keep himself in countenance, he requested the Defender to take the sheep and send them to his brother George at Edinburgh, to be sold for the pursuer's behoof; but he begged the Defender at the same time not to make the transaction public, adding that he would state the same to be as advantageous as if he had concluded with the butcher at Moffat." Accordingly the defender sent the sheep to his brother, and he produced his brother's account, in which he gives the pursuer credit for £48, being the balance of the price received after deducting £1, 14s. for charges. "By that account it appears that the Defender is in no way a party to the transaction." He said he had handed to Paterson £40 of the £48, leaving a balance due by the defender of £8, subject always to a reasonable allowance for his trouble.

The Sheriff pronounced this interlocutor:—

"SELKIRK, 25th April 1812.—The Sheriff-Depute, in order to avoid the expense of a proof, and in respect the Defender seems to acknowledge receipt of the sheep and not to deny that in the eye of the public he was to be held liable for the full price of 28s. per sheep, appoints him to condescend and say how he intends to prove the alleged private condition between him and the pursuer that the sheep, though bought in open market at a fixed price, were in fact only entrusted to him upon commission, and prohibits him from putting any arguments into the said Condescendence. Appoints the pursuer to answer the same.

"(Signed) WALTER SCOTT."

The defender in reply had "no hesitation in referring the point to the oath of the pursuer himself." Referred it was accordingly. The result was not to support the defender's story; and the Sheriff gave final judgment in this interlocutor:—

"SELKIRK, 1st *September* 1812.—The Sheriff having advised this process with the oath of party *in causa*, find the Defender liable in the sums pursued for as libelled, and also in expenses of process and decerns.

"(Signed) WALTER SCOTT."

AN INTERESTING TWEED ACT PROSECUTION

In December 1810 the procurator-fiscal brought a charge of contravening the Tweed Fisheries' Acts against Michael Anderson, Esquire, of Tushielaw. This must have been a *cause célèbre* in Selkirkshire. The proceedings were remarkable not only from the fact that they were taken against a landed proprietor and well-known county gentleman, but also from the curious nature of the facts alleged. A first summons was served on the date mentioned, in which Mr. Anderson was accused of having fished for and killed fish in the rivulet called the Rankle Burn during close time; and a second summons was served on 20th February 1811 (and ultimately substituted for the earlier summons) in which the charge was not only of fishing for and killing fish in the said rivulet and in the Ettrick and other rivers and streams which communicate with the Tweed, and in the Tweed itself, but also of buying or selling, or having in his custody or possession, fish of specified classes, knowing the same to have been taken during close time. It is not surprising, perhaps, that the procurator-fiscal should have amended his charge in this way, when the evidence actually adduced by him is considered. Two witnesses were examined. James Freer, mason in Selkirk, deponed that in November 1810, in the way of his duty as surveyor of the highways in the county, he went to Tushielaw to meet with Mr. Anderson, to accompany him to some roads that were being made up at Rankle Burn. The party, consisting of Mr. Anderson, his servant, and witness, when about two miles above Buccleuch, where the burn is very small, were obliged to ride up the middle of the runner. Mr. Anderson was first, witness next, and the servant last. "When in the burn, a fish, either a large trout or of some other species, taking the alarm, and being disturbed by Mr. Anderson's horse, made a sudden run and actually forced itself out of the burn on the dry rocks. Mr. Anderson passed on, and the witness coming next with a stick in his hand, bowed himself forward and with his stick killed the fish, but did not then take it up." On their way back Freer got off his horse, took up the fish, and "carried it home to Tushielaw, and gave

it to a boy at the Stables, without giving him any directions relative to the disposal of it, but whether the boy was a hired servant of Mr. Anderson's or not" he did not know, but he had seen him about Mr. Anderson's stables both before that day and after it. Freer dined at Mr. Anderson's house that day; he stated that he ate some salt sea-fish, but he did not recollect of seeing in Mr. Anderson's house that day, or of eating there, any fresh-water fish. A servant in Mr. Anderson's employment, Nelly Scott, stated that on the day in question a fish was brought into the kitchen, but by whom she did not recollect. It was about 14 or 15 inches in length, "one of those trouts which come up the burns about the Martinmas time." She boiled the fish, and said she had no doubt it was used in Tushielaw house. (The proceedings and the evidence are set forth at length in the Appendix, No. 66.)

Sir Walter Scott's judgment in the case was as follows:—

"SELKIRK, 24th March 1813.—The Sheriff having advised the proof led and whole cause finds that the pursuer has failed to prove either that Mr. Anderson killed or had in his possession a salmon trout, Bull trout, Salmon, or Whitling, contrary to the provisions of the Act, therefore assoilzies the Defender and decerns, But in respect of the circumstances set forth in the proof finds no expenses due.

"(Signed) WALTER SCOTT."

THE SHERIFF MAKES USE OF HIS LOCAL KNOWLEDGE

Mr. John Boyd of Broadmeadows brought an action against Gideon Scott, tenant in Kirkhope,(a) for £10 for damages sustained through trespass committed by Scott's servants upon the pursuer's lands, and (b) for £10 as further damages for the wanton and illegal conduct of the defender's servants in leaving the gates of the pursuer's inclosures open whereby a number of cattle strayed from their proper inclosure into a field of turnips and potatoes belonging to the pursuer, which they injured. The occasion was a sale by auction of stock. The two interlocutors (which are both in the handwriting of Sir Walter Scott) are as follows:—

“SELKIRK, *26th February* 1812.—To avoid if possible the necessity of an expensive proof in the cause the Sheriff-Substitute having advised with the Sheriff-Depute appoints the Defender to lodge a Special Condescendence of what he avers and offers to prove concerning the conduct of his servants or the persons employed by him on that occasion which gave rise to the complaint of the pursuer.

“(Signed) CHAS. ERSKINE.”

“SELKIRK, *28th July* 1813.—The Sheriff-Depute having advised the proof for both parties and whole cause finds it proved that a trespass has been committed in respect it is admitted by the Defender's own Witnesses that the drivers turned one of Mr. Gibson's cattle into a park of the petitioner and from the positive evidence of Glendinning compared with the imperfect recollection of John Shiel, who had probably been assisting at the conviviality of the roup¹ as usual on such occasions, as well as from the sketch produced and the Sheriff's own local knowledge of the place, finds

¹ Auction.

that the persons employed to remove the cattle neither proceeded with proper discretion nor took the right road; therefore finds the Defender liable in damages which he modifies to one guinea sterling as also in expenses; and decerns.

“(Signed) WALTER SCOTT.”

DRAM GLASSES FOR THE KING'S BIRTHDAY ENTERTAINMENT

James Inglis, merchant in Selkirk, sued George Young, saddler in Selkirk,¹ for £2, 1s. 3d., made up as follows:—

Dram Glasses—Loan, 1 day	£0	8	0
9½ lbs. Refined Sugar at 1s. 4d. per lb.	0	12	8
1 doz. large lemons	0	4	6
1 doz. Dram glasses	0	8	0
Balance on Barley	0	0	1
Loan of 16 doz. at 6d. per doz. Per bargain	0	8	0
	<u>£2</u>	<u>1</u>	<u>3</u>

The defender in his defences stated that, having to accommodate the company at the entertainment given on the King's birthday in June 1813, he applied to the pursuer for sugar and lemons wanted by him on that occasion, and asked to be accommodated with a number of glasses, which it is customary for the person who furnishes the goods to the innkeeper to give gratis on these occasions. The defender kept one dozen glasses, and after the action was raised paid £1, 13s. 3d. to account, leaving unpaid only the disputed 8s. (for hire of glasses). He stated that the glasses were returned on the day following the entertainment. When the glasses were received by him "they were all covered with dust and dirty, and he returned them to the pursuer clean and sound, and, in fact, better of being used."

To this the pursuer answered that the merchants of Selkirk, having found that their glasses sold very ill, the innkeepers and others wishing much rather to borrow than to buy them, agreed upon having a small profit for their trouble and risk, and accordingly charged 6d. per dozen for the loan. "The pursuer does not know that glasses sell the better

¹ Young, who from this case appears also to have been an innkeeper, was pursuer (as a Freemason) in the case for recovery of a subscription to a Masonic Lodge (see p. 61).

of being cleaned, and states that he broke a tumbler glass in taking down the glasses, which cost him 2s."

The judgment in Sir Walter Scott's handwriting was this:—

"SELKIRK, 28th December 1814.—The Sheriff-Substitute having fully advised with the Sheriff-Depute, and having maturely considered the Summons, Defences and Answers, finds that the pursuer is admitted in the defences to have intimated his intention to charge for the use of the glasses and though the charge appears extravagant being equal to one fourteenth part of the value of the commodity but yet it was never explicitly departed from or modified, But finds there is an overcharge of sixpence in respect one dozen of glasses were purchased, for the loan of which that sum is charged; Therefore finds the Defender liable in the sum of seven shillings and sixpence and decerns, But assoilzies *quoad ultra*, and finds no expences due.

"(Signed) CHAS. ERSKINE."

THE ILLEGAL REMOVAL OF A CART AND HARNESS

William Laing, Sinton Mains, brought an action against John Smith, carter in Selkirk, for recovery of £10, 10s., the value of a cart and harness belonging to the pursuer, which he alleged the defender had taken from the custody of an innkeeper in Edinburgh, "who was keeping the same for the pursuer." Smith admitted having removed the cart and harness, but stated they had been handed over by him to another man. The first interlocutor (by Sir Walter Scott) was:—

"SELKIRK, 20th *January* 1813.—In respect that it is admitted by the Defender that he assumed the custody of the pursuer's property without any authority and that he suffered it to be abstracted from him by a third person instead of taking any effectual means to restore it to the owner, finds him liable in the value thereof, and that the same may be ascertained Appoints the pursuer to condescend upon the original price of the cart, the time he had it, and the manner in which he used it.

"(Signed) WALTER SCOTT."

In obedience to this order, Laing stated, by a minute, that the original price of the cart was £8, 10s., and of the harness and chains £3, 10s. He had it about two months in his possession, "and drove it six journeys to Edinburgh." Whereupon this judgment was issued:—

"SELKIRK, 1st *September* 1813.—The Sheriff having advised this Minute, and no Answers having been lodged, finds the defender liable in the sum of ten pounds ten shillings pursued for and decerns, and further finds him liable in expence of process.

"(Signed) WALTER SCOTT."

A CASE OF *MEDITATIO FUGÆ*

In 1818 one Jean Crawford, the daughter of an Excise Officer in Melrose, applied for a warrant to imprison William Sandilands, labourer at Philiphaugh, in respect that he was *in meditatione fugæ*. According to the law of Scotland, when a creditor can make oath that his debtor contemplates leaving Scotland, or that he has reasonable ground for believing that he intends to do so, he may apply to a magistrate for a *meditatio fugæ* warrant, and the magistrate will grant a warrant for apprehending the debtor for examination, and may afterwards, if so advised, grant a warrant to imprison him until he finds a guarantee that he will be forthcoming to answer to the suit. Sir Walter Scott did not act as the magistrate in this case, although the petition was presented to the Sheriff. It was Erskine who disposed of the application. But, as Jean Crawford was residing in Edinburgh, it was necessary to have her statement on oath taken there. Accordingly, for this purpose, the Sheriff-Substitute granted authority to Walter Scott, Esquire, Sheriff-Depute of the Shire, to take the petitioner's evidence on commission. Sir Walter took her evidence as directed, and reported¹ to the Sheriff-Substitute.

This *meditatio fugæ* warrant was a favourite theme with Sir Walter Scott, the author. Many allusions to it are scattered through his novels. For example, in *Redgauntlet*,² Peter Peebles bursts into the library of the English Justice of the Peace and startles that functionary with, "Gude day to ye, gude day to your honours; is't here they sell the fugie warrants? Is it here where ye sell the Warrants?—the fugies, ye ken?" And Edie Ochiltree in *The Antiquary*³ interrupts the learned discussion of Monkbarns on imprisonment for debt, with the result of his ripe experience, thus—"Ay, that will be what they ca' the 'fugie' warrants; I hae some skeel in them. There's Border warrants too in the south country, unco rash uncanny things. I was ta'en up on ane at Saint James's Fair, and keepit in the auld kirk at Kelso the haill day

¹ See Appendix, No. 100.

² Chap. vii.

³ Chap. xxxix.

and night; and a cauld goustie place it was, I'se assure ye." Then, too, in the account which Scott wrote of his cruise with the Commissioners of Northern Lighthouses in their yacht in the Vacation of 1814 he records this jest which he made:—

"3rd August.—At Sea, as before; no appearance of land; proposed that the Sheriff of Zetland¹ do issue a *Meditatione fugæ* warrant against his territories, which seem to fly from us."

¹ His friend William Erskine afterwards Lord Kinnedder.

THE FRENCH PRISONERS OF WAR

In an action raised by William Scott and fourteen others, "all in Galashiels," against Alexander Turnbull, Whitebanklee, we have rather a pathetic picture of the plight of seven Frenchmen in the year 1814—if, that is to say, Turnbull's account of the incident comes anywhere near the truth. These fifteen men from Galashiels¹ stated that they were employed by Turnbull, upon a day in May in that year, "to assist in conveying seven French Prisoners of War from Whitebanklee to Selkirk, for which he received the reward given by the Transport Board for the apprehension of such prisoners, besides the necessary expenses." Yet he refused to pay them "for their trouble and expenses, being Five pounds eleven shillings Sterling, per award of James Pringle, Esquire, of Torwoodlee, one of His Majesty's Justices of the Peace for the County of Selkirk." This award they produced. It was as follows:—

"ACCOUNT FOR APPREHENDING FRENCH PRISONERS AND CONVEYING
THEM TO SELKIRK.

Galashiels.

To 3 Constables going to Clovenfords and sitting all night and
going to Selkirk with seven French Prisoners of War.

To 12 Asst. to do. do. from Gala.

2 from Whitebanklee to Selkirk.

8 Men sitting all night.

George Turnbull per Carts and ale £1 4 10

Two carts 0 12 0

£1 16 10

3 Constables @ 9s. . . . £1 7 0

12 Assistants @ 7s. . . . 4 4 0

£5 11 0

2 Men to Whitebanklee 3s. . . . 0 6 0

8 Sitting up @ 1s. 6d. . . . 0 12 0

£6 9 0

To George Turnbull for information 0 6 0

£6 15 0

(Signed) J. W. PRINGLE.

¹ Their names will be found in the Appendix, No. 79.

"Sir pay the constable in Galashiels the sums as stated within to satisfy all those employed in apprehending the French Prisoners.

"Torwoodlee, 30th May 1814.

(Signed) J. W. PRINGLE, J.P.

"To Mr. Alex. Turnbull, Whitebanklee."

Alexander Turnbull lodged defences. In the course of this document he states that "in the month of November 1813 a number of the French Prisoners of War confined at Valleyfield or Pennycuik, contrived to make their escape from one of these depots. Favoured by the darkness of the night, they were fortunate enough to elude the vigilance (*sic*) of their Pursuers, and by that means were at large, wandering about the country for some days. Late in the evening, on the third day after their escape, seven of them in a body, came to the Defender's house at Whitebanklee and enquired for quarters. They, after partaking some refreshment, were shown into an Outhouse, where they took up their abode for the night. Suspicions having arose in the Defender's family, from their language and other circumstances, that they were prisoners who had either broken their Parole, or escaped from confinement, and that they might probably make an attempt on their property or person, they came to the resolution of making the circumstances known to Mr. Pringle of Torwoodlee, who resided in the neighbourhood. In consequence, one of the Defender's sons was despatched to Torwoodlee with the information, who very properly desired him to go down to Galashiels, and procure the assistance of two or three constables, which he accordingly did. So soon, however, as the report spread, that there were a number of Frenchmen at Whitebanklee, and that three constables had gone up there to assist in apprehending them, the whole town was in a bustle; numbers rushed on of their own accord to the scene of action, some armed with guns and pistols, others with bludgeons and such warlike weapons. In the course of the night the Frenchmen's habitation was thus completely beset and the whole had rather the appearance of a besieging (*sic*) army, than anything that can be conceived to the contrary. Next day the seven prisoners were, in the above way, escorted to Selkirk, and the grotesque appearance of the cavalcade as they entered the town was truly ludicrous, particularly when it is known that these poor unfortunate prisoners were strongly secured with ropes and other devices, to prevent their escape, and were guarded, in addition to the Constables employed, by above thirty of the number, who had assembled at Whitebanklee the preceding evening to enjoy the fun. An account

of expenses was shortly afterwards given in to the agent for Prisoners at Selkirk from various parties, which was transmitted to the Transport Board for their approbation. The accounts, however, were returned in course of post by the Board who expressed the greatest surprise at the very extravagant charge made, and the number engaged in the conveyance of the prisoners to Selkirk: indeed the Board were so aware of the absurdity of the charge that they restricted the sum to a mere trifle in comparison to the original charge. On application by the Defender, the Transport Board authorised their agent in Selkirk to allow him at the rate of one guinea for each prisoner, which he received, besides an allowance of about £7 for the expenses of apprehending them, which was paid to the Constables who were employed in the business, to be divided amongst those engaged in the transaction according to their claims.

"These are therefore the grounds upon which the present Action is founded; and the Defender contends, that he is neither by law nor Justice bound to pay these pursuers the sum of £5, 11s. claimed by them. It is quite true that he received a reward of £7, 7s. from the Transport Board for the seven Prisoners before mentioned but this was exclusively his own; he got no part of the expenses allowed on that head; and if the pursuers did really assist in the escort to Selkirk, they must look to the Constables who received these expenses for payment of their trouble. The Defender himself never employed them, and if they were so obliging as to volunteer their services on this occasion, without being called upon by the Defender so to do, they have only themselves to blame.

"Supposing even that the Defender was by law bound to pay the Pursuers for their trouble, he conceives the rate fixed by Mr. Pringle by far too extravagant; for they are allowed at the rates of 9s. and 7s. each for assisting in conducting the prisoners to Selkirk, a distance of little more than six miles: whereas the Transport Board only authorised their agent to pay each such person the sum of 2s. 6d. The Defender is therefore fully aware, that Mr. Pringle was misled when he granted the order produced in process, and was also ignorant of the rate of allowance granted by the Transport Board, and of the circumstance of the expenses allowed being paid over by the Agent directly to the Constables for the purpose of being divided amongst those employed as already mentioned, without his receiving any part thereof. The Defender has no wish to withhold from any person what may be

fairly considered as due to him, but in this case he is persuaded he owes the Pursuers nothing, having never employed them in the transaction alluded to; all that he desires therefore is that your Lordships will remit to Mr. Pringle to make farther enquiry into the transaction, and to revise his order with the rate of allowance made by the Transport Board, and to ascertain who received the expenses already received, and how it has been applied. If it shall be thus ascertained, that the Defender is liable to the Pursuers in payment of their demand, he will at once accede to any order which that Gentleman may grant, but as matters stand he cannot."

The pursuers, of course, lodged answers. Of the defences they say:—"Of this paper which consists of no less than 9 pages scarcely as many lines relate to the point before your Lordships. It is somewhere however therein said that the Defender did not employ the Pursuers in the business alluded to in the Libel. This is not true, his son came to Galashiels and employed every one of them, and when they set out with the Prisoners he the Defender regretted that there was not more strength, the Frenchmen being as he said strong desperate fellows and armed with large knives. It is somewhere else said that the Constables were paid the sum allowed by the Transport Board as Expenses in apprehending the Prisoners. This they as positively deny. The three constables employed are pursuers in this Action and not one of them has received one penny. The whole money both reward and expenses was paid by the Agent of the Transport Board to the Defender himself, and it would be excessively hard were the Pursuers through whose services both were gained to him not to be allowed their reasonable hyre.

"The Defender has also quarrelled with the sums allowed by Mr. Pringle of Torwoodlee to each of the Pursuers for their trouble but as he was acquainted with the trouble they had and the time their services were employed having been up all the night in Whitebanklee stable and engaged all the next day, it is not believed your Lordships will be pleased to quarrel the rates of allowance he has made. Indeed the Pursuers may contend that His Majesty's Justices of the Peace are alone authorised by law to fix the rates of allowances to Constables or other persons employed in the Police of the Country so that Mr. Pringle's Award is in this case binding to all intents and purposes.

"The agent who has signed these Defences was, it is understood,

also the agent for the Transport Board; and the Pursuers could not have believed he would have signed a paper he must know in some respects to be false, particularly where it is said that he paid the constables. The Pursuers, however, think the Defender's agent may have been led in a mistake in this respect from his having at the same time he paid the Defender also paid to Mr. John Turnbull, at that time merchant in Galashiels, now in Selkirk, a similar reward and a certain sum of expenses for apprehending Five Prisoners of War at Galashiels and carrying them to Selkirk, but that Mr. Turnbull to his credit behaved in a different style than Mr. Turnbull the Defender as the moment he received his reward and expenses for these five he without waiting for any Award from Mr. Pringle or any action before your Lordships immediately divided the whole money both reward and expenses amongst himself and his assistants.

"If Mr. Turnbull the Defender had too large a party for apprehending the seven prisoners it was his own blame and if he has not got a sufficient allowance from the Transport Board which, however, he has yet carefully concealed, it is neither their fault nor their business to inquire; they were employed by him and by him they must be paid."

The Sheriff first issued this interlocutor:—

"SELKIRK, 22nd March 1815.—The Sheriff-Depute having advised the Summons with defences and answers Remits to James Pringle Esquire of Torwoodlee under whose authority as a Justice of Peace the parties acted requesting he will have the goodness to report whether or to what extent the concurrence presently pursuing are entitled to any share of the sum paid by government for apprehending the French prisoners of war.

"(Signed) WALTER SCOTT."

Mr. Pringle reported thus:—

"TORWOODLEE, 20th September 1815.—Having considered your Lordship's remit of the 22nd March last, see no cause for altering the rate of payment formerly ordered to the assistants in apprehending the seven French Prisoners at Whitebanklee, as I have always understood the Bounty of £1, 1s. per man, was payable only on the delivery of the prisoner at the nearest depot, consequently the expense of bringing him there must come off said bounty.

"(Signed) J. A. PRINGLE."

The Sheriff decided in favour of the fifteen men of Galashiels.

"SELKIRK, 17th January 1816.—The Sheriff-Depute having advised this Process with the report of James Pringle Esquire, Finds the Defender liable in payment of the sum of Five pounds eleven shillings sterling with interest from the date of citation. Finds him also liable in expenses of process and Decerns.

"(Signed) WALTER SCOTT."¹

¹ Another reference to the presence of French prisoners in the neighbourhood will be found in Case No. 78 in the Appendix.

THE DESTRUCTION OF A DOG

James Anderson, the farmer of Whitslaid, with concurrence of the procurator-fiscal, brought an action against William Rae and John Oliver, both herds in Shaws, for damages for killing a valuable pointer dog belonging to him. He asked £20 "as *pretium affectionis* and value of the dog," and the procurator-fiscal asked £10 of penalty for cruelty. The defenders stated that they had seen the same dog "running amongst their lambs" on a previous occasion, and later a number of lambs were found dead, "evidently caused by the bite of dogs." On the occasion in question they alleged this dog was again running among the lambs. They did not say it was "touching" them. They saw it; then the lambs scattered. "So they fell upon him and despatched him." The following interlocutor, written by Sir Walter Scott, was issued:—

"SELKIRK, 2nd March 1814.—The Sheriff-Substitute having advised with the Sheriff-Depute, in respect that every case of this kind must depend upon circumstances, allow the defenders, who admit having killed the dog, a proof of the circumstances set forth in their Defences and the pursuer a conjunct probation as accords and requires attention to the two following points, whether the dog could have been secured without killing him supposing always he was not found in the act of worrying sheep, and secondly whether it had a collar at the time or was known to belong to the pursuer.

"(Signed) CHAS. ERSKINE."

A proof was begun. So far as it went, it bore out the averments of the defenders, but there was no evidence of the dog having been seen worrying sheep. There was an adjournment. After the lapse of a considerable time the Sheriff-Substitute ordered the proof to close on a certain date. But, so far as appears, no further evidence was led, and there were no further proceedings in the case.

A HUMBLE TRADE

What must appear to us to-day to be a curious gradation of the callings in life is to be found in the defences in a case of *Moffat* against *Haldane*, in 1815. The action was one for aliment of a child, and the defender pleaded that the rate of aliment claimed (£8 a year) was too high for people in the rank of life of himself and the pursuer. "He was bred a mechanic," he said, "and carried on the business of a wright, and on ceasing to carry it on owing to his circumstances being reduced he is now compelled to betake himself to the humble trade of an inn-keeper in the village of Galashiels." Sir Walter modified the rate to £6 per annum. (See *infra*, Appendix, No. 77.)

RIGHT TO ATTEND A HIRING FAIR

The question whether a servant is entitled to attend a hiring fair against his master's orders was raised, but not expressly decided, in a case before Sir Walter Scott in 1817. John Horsburgh, who had been engaged as a "Barn man" by John Mark,¹ farmer at Mossilee, attended the Public Hiring Market of Selkirk in 1816, although his master had refused him permission to go. He brought an action for wrongful dismissal, although his master had not dismissed him. Sir Walter's interlocutor, written by him and signed by the Sheriff-Substitute, was in these terms:—

"SELKIRK, 8th January 1817.—The Sheriff-Substitute having advised with the Sheriff-Depute, and having considered the proof and whole process, Finds the pursuer absented himself from his Master's service against his orders upon Wednesday Sixth March, and did not return until the morning of the next day, Finds that notwithstanding this misdemeanour his master offered to receive him back on condition he would be a steady and regular servant till Whitsunday, and that the pursuer left his service without reply, Therefore finds the Defender only liable in payment of wages corresponding to the period for which the pursuer actually served him namely down to the Sixth day of March, Finds the pursuer liable in expenses of process and allows an Account to be given in and allows the pursuer to retain the said proportion of wages *pro tanto* of the said expenses.

"(Signed) CHAS. ERSKINE."

¹ This is the John "Merk" who was one of the persons charged with vicarious Sabbath-breaking, *supra*, p. 37.

THE LITIGIOUS MR. PARK

It is obvious that the Sheriff Court had no terrors for Mr. George Park, tenant of Carterhaugh and of Oakwoodmill. Rather, it may be said, it attracted him. One can imagine at least (for I do not know whether it is the case) that he was related to the famous traveller, Mungo Park, whose statue has a deserved prominence in the town of Selkirk, and, therefore, also to the Mr. Alexander Park who was so redoubtable a pleader in the Selkirk Sheriff Court at that time. Of the cases disposed of by Sir Walter Scott, George Park was a party in six, and in a seventh¹ he had at least this reflected glory, that it was his shepherd who was accused of poaching. In two of these six cases (No. 61 and No. 82) Park was the pursuer. He won the former completely, and in the latter his success was considerable—but so was that of his opponent. In four actions (Nos. 14, 37, 45, and 57) he was defender. In two of these the success was divided; in a third the case was settled after a judgment which seems to indicate that Park was on the high road to success; and in the fourth, the *Toll* case (see p. 43), he was successful, because, while he defied the toll-keeper on the day of St. Boswells Fair, he afterwards had the shrewdness to offer to pay the small sum due before it was too late.

One of these cases (No. 82) was brought by Mr. Park against Andrew Cowan, a contractor. Interdict was asked against the defender, while he was building a march dyke, from opening up quarries on, and driving stones through, Park's fields. Sir Walter Scott's first interlocutor was in these terms:—

“SELKIRK, 24th August 1816.—The Sheriff-Depute having advised the petition, with the Answers, removes the interdict² so far as it affects the working of the single quarry mentioned in the Answers, and Appoints the Respondent to observe one Cart-tract in driving to and from the same, in respect that the damage already

¹ No. 101. See also p. 93.

² Interim interdict had been granted by the Sheriff-Substitute.

incurred cannot be increased in any material degree by his continuing to work the same, but continues the interdict as to such parts of the farm as are in crop with the exception of the quarry above mentioned, and removes the same as to any waste or fallow lands where stones can be collected without injury to the farm, and supersedes¹ further Answer untill the Sheriff or Sheriff-Substitute shall visit the premises. “(Signed) WALTER SCOTT.”

It was the Sheriff-Substitute who visited the scene of the dispute. He must have reported to the Sheriff verbally or by a private letter. Sir Walter then issued this interlocutor:—

“SELKIRK, 20th November 1816.—The Sheriff-Depute on report of the Sheriff-Substitute refuses the prayer of the petition and removes the Interdict so far as not removed by his former Interlocutor, but enjoins the Respondent under certification to proceed in completing the dyke only at the period of frost which may be now expected and to conduct the driving of the horses from the quarry so as to do the least possible injury to Mr. Park's farm and supersedes¹ Answer as to the question of expenses until the dyke is completed. “(Signed) WALTER SCOTT.”

In the case of *Murray v. Laidlaw* (App. No. 87) Sir Walter remitted to Mr. Park to report as to the management of the farm in question. This duty Mr. Park declined because he was one of the trustees on the estate of the defender.

¹ *I.e.* delays, or stays.

NOT A CASE FOR PAROCHIAL RELIEF

Elizabeth Inglis, Borthwickshiels, raised an action against the Kirk-Session and Heritors of the Parish of Robertson. She stated that she had to maintain three young children, and that the means left her by her husband had been extinguished. She had applied for parochial relief, but this had been refused. Accordingly she asked the Court to “modify a suitable aliment to be paid to her weekly out of the Poors’ funds of the Parish.” The kirk-session and heritors opposed the application. It was not, they stated, a necessitous case. The applicant had seven children, and several of the family were supporting themselves. The pursuer’s husband had left a considerable sum of money; but this had been uplifted from the bank and re-deposited in the name of the oldest son, “who is an apprentice drawing 1s. 6d. a day, besides his victuals.” The case was disposed of by the following interlocutor and note :—

“SELKIRK, 30th December 1818.—The Sheriff-Depute having considered this petition with the Answers and replies, and holding the Kirk-Session to be the natural and best judges of the claims of those applying for parochial relief, refuses the prayer of the said petition, and decerns. (Signed) WALTER SCOTT.”

“The Sheriff-Depute takes this opportunity of intimating that unless in some case of a very gross and particular kind he will never alter the decision of the Kirk-Session touching the poor.”

SIR WALTER SCOTT'S LEGAL ANALOGY

In the course of a long and involved action and counter-action¹ between Mr. Scott of Sinton and Robert and Peter Dickson, his tenants in Dimpleknowe—the counter-claim stating that the rent had been fixed on the footing that the farm consisted of 250 acres, whereas in fact it extended to only 234—the tenants stated in their answers that “the holding out certain measurements was *in mala fide*, and intended to deceive.” Mr. Scott presented a reclaiming petition, in which he took exception to this statement. One gathers from the interlocutor immediately to be quoted that the tenants or their procurator must have protested that the statement was made “only in a Pickwickian sense.” Be this as it may, the allegations moved Sir Walter to refer to a favourite subject of his. There are few fictions in Scots law—the English system is the cultivated garden of these growths; but one or two have, so to speak, grown wild in Scotland, and this is one of them. In his note to the interlocutor of 5th February 1817 the Sheriff writes: “The Sheriff appoints the petition to be withdrawn as unnecessary, because there could not be any room for considering this as a case of character, and because in the circumstances of the case there cannot be reason to suppose that Mr. Scott conceived the idea of passing off his farm for more extensive by 15 acres than it really was. A certain latitude must be allowed for pleading in a Court of Justice, which cannot be always narrowed within the strictest bounds. All questions of this nature must be pleaded as questions of fraud—that is, not fraud in the ordinary sense, but legal or constructive fraud, which has no more connection with what is usually called so in common language than a person being put to the horn has with actual treason or rebellion.”

This “putting to the horn” was a favourite subject with Scott. There is a passage in *The Antiquary* (published two years before this judgment) in which he expounds it.² Monkbarns, his nephew, and

¹ This case is set out at length in the Appendix, No. 99.

² Chap. xxxix.

Edie Ochiltree are discussing Sir Arthur Wardour's affairs. "I doubt," said Edie, "Sir Arthur will be in stane wa's for debt unless there's swift help and certain." "You speak like a fool," said the Antiquary. "Nephew, it is a remarkable thing that in this happy country no man can be legally imprisoned for debt." "Indeed, sir?" said M'Intyre. "I never knew that before; that part of our law would suit some of our mess well." "And if they arena' confined for debt," said Ochiltree, "what is't that tempts sae mony puir creatures to bide in the tolbooth o' Fairport yonder. They a' say they were put there by their creditors. —Odd! they maun like it better than I do if they're there o' free will." "A very natural observation, Edie, and many of your betters would make the same; but it is founded entirely upon ignorance of the feudal system. Hector, be so good as to attend, unless you are looking out for another—Ahem!" (Hector compelled himself to give attention at this hint.) "And you, Edie, it may be useful to you *rerum cognoscere causas*. The nature and origin of warrant for caption is a thing *hanc alienum a Scævolæ studiis*. You must know then, once more, that nobody can be arrested in Scotland for debt." "I haena muckle concern wi' that, Monkbarns," said the old man, "for naebody wad trust a bodle to a gaberlunzie." "I pr'ythee peace, man. As a compulsitor, therefore, of payment—that being a thing to which no debtor is naturally inclined, as I have too much reason to warrant from the experience I have had with my own—we had first the letters of four forms, a sort of gentle invitation, by which our sovereign lord the king, interesting himself, as a monarch should, in the regulation of his subjects' private affairs, at first by mild exhortation and afterwards by letters of more strict enjoinder and more hard compulsion—— What do you see extraordinary about that bird, Hector? it's but a sea-maw." "It's a pictarnie, sir," said Edie, "Well, what an if it were—what does that signify at present? But I see you're impatient; so I will waive the letters of four forms, and come to the modern process of diligence. You suppose, now, a man's committed to prison because he cannot pay his debt? Quite otherwise; the truth is, the king is so good as to interfere at the request of the creditor, and to send the debtor his royal command to do him justice within a certain time—fifteen days, or six, as the case may be. Well, the man resists and disobeys; what follows? Why, that he be lawfully and rightfully declared a rebel to our gracious sovereign, whose command he has disobeyed, and that by three blasts of a horn at the market-place of Edinburgh, the metropolis of Scotland. And

he is then legally imprisoned, not on account of any civil debt, but because of his ungrateful contempt of the royal mandate. . . . What say you to that, Hector? there's something you never knew before." "No, uncle; but I own, if I wanted money to pay my debts, I would rather thank the king to send me some than to declare me a rebel for not doing what I could not do." "Your education has not led you to consider these things," replied his uncle; "you are incapable of estimating the elegance of the legal fiction, and the manner in which it reconciles that duress which, for the protection of commerce, it has been found necessary to extend towards refractory debtors with the most scrupulous attention to the liberty of the subject."¹

¹ It is not often that a quotation from a novel is to be found in a volume of Law Reports. But the above passage is quoted in the case of *Thom v. Black*, 5th December 1828 (7 Shaw, 158). In that case, decided by the First Division of the Court of Session—with Sir Walter Scott probably sitting as clerk at the table—Lord Gillies said, "The law on this subject cannot be better expressed than it is by Monkbarns in a work of fiction with which we are all well acquainted."

THE HARE IN THE GIRN OF WIRE

A poaching case against John Rodger, a shepherd in Oakwood, discloses some unusual facts, and was decided in an interesting judgment by the Sheriff. Rodger was charged at the instance of Thomas Hutson,¹ gamekeeper at Shielshaugh to the Duke of Buccleuch, with concurrence of the procurator-fiscal, with "contravening an Act for preserving the Game, dated 26th March 1707, cap. 13."² The matter was referred to the oath of parties, by interlocutor of the Sheriff-Substitute. The deposition of Rodger is quoted at length.

"Compeared John Rodger the Defender who being solemnly sworn and examined Depones, That one morning about two or three weeks after Martinmas last Eighteen hundred and seventeen, the Deponent (who is Mr. Park's shepherd on the farm of Oakwoodmill) was attending to his master's sheep which were upon turnips, his the Deponent's dog left him and at a very short distance from where he was, it came upon a hare and on going up to the hare the Deponent found it was dead in a Girn³ of Wire. The Deponent took the hare out of the Girn and he had not had it in his hand or Mad-nook⁴ (he is not sure which) for more than four minutes when Mr. Shaw, one of the Duke of Buccleuch's Gamekeepers, came up behind him with a gun in his hand, and he asked the Deponent what's this he had got; and the Deponent told him he had got a hare, at the same time mentioning the circumstances how and in what way it had come into his possession, and the Deponent offered the hare to Mr. Shaw

¹ Dandie Dinmont (*Guy Mannering*, Chap. xxii.) refers to "Tam Hudson, the keeper." In the first edition (so meticulous were Scott's precautions against the revelation of the authorship of *Waverley*) the keeper's real name was not used. In the later editions, as the footnote bears, "the real name of this veteran sportsman is restored."

² In Record Edition of Scots Acts, numbered cap. 91, vol. xi. c. 488.

³ A snare of wire or hair with a running noose.

⁴ *I.e.* the corner of his *mawd* (or *maad* or *maud*), a shepherd's plaid or mantle.

which he refused to receive. Depones that he was engaged with his sheep during the day but in the evening he carried the hare to Thomas Hutson at Shielshaugh, the Pursuer, thinking that giving it over to Mr. Hutson would free the Deponent from any penalty or fine which might have been incurred in consequence of his having carried the hare, but Mr. Hutson also refused to receive the hare, desiring the Deponent to take it home and make use of it in his own family which the Deponent did accordingly; and on taking the skin off it several lead drops fell from the hare testifying that it had been shot, and the Deponent avers in his present examination that this Hare was shot by Mr. Shaw, the Duke of Buccleuch's Gamekeeper aforesaid, and was by him put into the girn or snare, where he the Deponent found it; and he confidently avers that Mr. Shaw did this for the purpose of entrapping the Deponent and thereby getting a piece of money—Depones that when he the Deponent went with the hare and offered it to Mr. Hutson, as before mentioned, he offered Mr. Hutson a pound note or a guinea note to free him the Deponent of any penalty which he might have incurred by his having the hare in his possession, but Mr. Hutson refused to take the money. Interrogated how it came into his head thus to offer a bribe to Mr. Hutson—Depones that he knows that Mr. Hutson had formerly taken money on occasions similar to this—Depones that a short while before, perhaps within an hour of the time the Deponent found the hare as aforesaid, he heard the report of a gun within a short distance, but out of his view from where the Deponent was, and a person might have put a hare into the snare, where the Deponent found the hare, as already mentioned, between the time that he heard the report of the gun and the time that he found the hare, without his, the Deponent perceiving him do so as there was a rising ground which intercepted the Deponent's view, and when the Deponent did find the hare it was not stiff but was suppleways, as if lately killed, and the Hare was no way swelled about the neck, as it would have been had it been snared or strangled. Interrogated whether or not the Deponent did during the space of six months previous to the nineteenth day of December Eighteen hundred and seventeen hunt upon the lands of Oakwood Mill or other lands the property of Mr. Scott of Harden or other lands in the County of Selkirk with a dog or Gun, snare or other

engine and thereby kill or destroy a Hare or Hares or other game or if he had not during that period Game in his possession other than the hare before mentioned and particularly if he did not so hunt or kill game on the twelfth day of December foresaid—Dépones that he has no dog but a common shepherd's dog, that he has not had a gun in his hand for twenty years except for the purpose of shooting crows nor has he in that period used a gun for any other purpose and neither has he hunted or snared or set girns or had game in his possession during the period mentioned in the question except the hare before condescended on—All which is truth as he shall answer to God."

This interlocutor follows next:—

"SELKIRK, 30th December 1818.—The Sheriff-Depute in respect of what is set forth in the Defenders declaration Appoints Mr. Shaw the Gamekeeper as also the Pursuer Thomas Hutson to be judicially examined and ordains them for that purpose to attend in Court upon the 20th day of January next. Further appoints the Defender to state whether he will undertake to prove the averments he has made by proof and in case of the affirmative directs the Sheriff-Substitute to allow him a proof thereof.

"(Signed) WALTER SCOTT."

The declaration of Thomas Hutson was this:—

"Compeared Thomas Hutson, Gamekeeper to his Grace the Duke of Buccleuch, Pursuer in this cause, who being judicially examined Declares That a year ago or so the Defender John Rodger called at the Declarent's house one evening with a hare in his possession which he offered to the Declarent but which the Declarent refused to take from him. Rodger said he had found the hare in a Girn which girn he had himself set the night before but that he had not set another girn that year. The Defender made this admission in presence of the Declarent and of the Declarent's wife. That after the Declarent had thus refused the Hare the Defender offered to give him a bribe of a Guinea Note to say nothing more on the subject but which the Declarent also refused to take adding that were it a thousand pounds he would have nothing to do with it and the Declarent said that he would report Rodger's conduct to the Duke. That the Declarent desired

John Shaw to give the information to his Grace which Shaw did for the Declarant knows that William Currion who is also under the Duke's employment was with his Grace relative to the business. Declares that John Shaw told the Declarant that besides the Girn or Snare wherein the hare was found Shaw had seen on the same ground the former day a broken girn or snare in a conduit and it was in consequence of seeing this broken girn that Shaw had the next day gone in pursuit of poachers. On being specially interrogated whether or not he believes that John Shaw was in the practice of putting hares into girns as alleged by Rodger and in particular whether or not he put the hare in question into the girn on Oakwoodmill ground Declares that he has every reason to believe that Shaw did put the hare in question into the girn wherein it was found by Rodger and he believes that to be the case in consequence of information which Shaw himself gave to the Declarant. All this he declares to be truth."

This is how Sir Walter dealt with these facts:—

"SELKIRK, 17th February 1819.—The Sheriff-Depute having advised this Petition with the procedure finds it proved by the admission of the pursuer that the hare in question was put into the girn by Shaw for the purpose of ensnaring the pursuer¹ finds that the pursuer¹ carried it to Mr. Hutson who refused to receive it and therefore that it remained in his custody by the virtual consent of a qualified person therefore refuses the prayer of the petition and decerns finds the pursuer liable in expenses of process and allows an account to be lodged. “(Signed) WALTER SCOTT.”

¹ Obviously this ought to be “defender.”

THE SHERIFF DECLINES JURISDICTION

Mr. Alexander Pringle of Whytbank, "as taking burden upon him for Colonel James Russell of Ashiestiel" (during his absence in India), let to William Brodie of Innerleithen, for the space of six years from Whitsunday 1812, at the yearly rent of £100, the mansion-house and parks of Ashiestiel as, at the date of the minute of agreement, "occupied and possessed by Walter Scott, Esq., Advocate." Mr. Brodie refused to pay the last half-year's rent in respect that some land was taken away for planting. Mr. Pringle raised an action against him for the rent. Colonel Russell, afterwards Major-General Sir James Russell, K.C.B., was a cousin of Sir Walter's, their mothers being sisters. Partly on this account Scott declined jurisdiction in the action by this interlocutor:—

"SELKIRK, 4th August 1819.—The Sheriff-Depute in respect of his near relationship to Colonel Russell, and more especially his connection with the facts of the case, declines to judge in this cause, and remits the same *simpliciter* to the Sheriff-Substitute.

"(Signed) WALTER SCOTT."

HARBOURING BEGGARS

In 1817 the procurator-fiscal brought a complaint against John Stewart and William Fairgrieve, both of Galashiels, charging them with having been "in the habit of lodging a great number of beggars and the like to the annoyance of the public," and asking for a penalty of £10 against each of them. He produced a "certificate," signed by a number of the inhabitants of Galashiels, declaring "that at times as many as 30 or 40 beggars are about Galashiels at once, and that they are afraid to have clothes out on hedges for fear of having them stolen." Sir Walter Scott disposed of the charge thus:—

"SELKIRK, 3rd September 1817.—The Sheriff-Depute, in respect of the admission of John Stewart and his promise of amendment Appoints him no longer to receive or harbour any vagrants under the penalty of fine and imprisonment, And in respect that Fairgrieve denies the charge brought against him allows the procurator-fiscal to prove the same *prout de jure*.

"(Signed) WALTER SCOTT."

After proof, Fairgrieve was convicted and fined fifteen shillings by the Sheriff-Substitute.

THE DIVINITY STUDENT'S EFFECTS

There is but a brief record of the sojourn in Selkirk of one Andrew Gibson, a student in Divinity. The only paper is a petition with an interlocutor thereon. He seems to have spent his summer vacation there, or part of it. "The Petition of Thomas Stoddart, Merchant in Selkirk, Humbly Sheweth, That Andrew Gibson, a Student in Divinity, lodged and boarded with the Petitioner, during his attendance on the Divinity Hall, at Selkirk in the Autumn of the year Eighteen hundred and nineteen; and when he left Selkirk on the Twenty-sixth of September that year he was due the Petitioner the sum of Four Pounds three shillings and elevenpence halfpenny Sterling, for Board and lodging: that in order so far to satisfy this Debt the said Andrew Gibson left in the Petitioner's possession a Trunk containing various articles of wearing apparel, consisting of coats, vests, pantaloons, drawers, shirts, neckcloths, and others, and several Hebrew, Greek, and French books, which still remained in his custody unredeemed." Stoddart asked warrant to sell the trunk and its contents. One could have wished that the petitioner, who was so explicit about the wardrobe, had given a list of the library as well; but, being in foreign tongues, the titles of the books probably baffled him. There is no report of the sale, which was authorised by the following interlocutor (written by Scott):—

"SELKIRK, 14th February 1821.—Having considered the foregoing application and advised with the Sheriff-Depute on the subject, grant warrant to the Clerk of Court, or any person having his authority, to sell by roup¹ at Selkirk Cross on any lawful day at mid-day, after regular advertisement on a market day at the said Cross at one o'clock, and on a Sunday at the Church door at dismissing of the congregation, as much of the effects mentioned in the Petition as will pay the petitioner's debt, and the necessary expenses incurred. The sale to be reported.

"(Signed) CHAS. ERSKINE."

¹ Auction.

AN ACTION AGAINST "THE ETTRICK SHEPHERD"

In 1821 Sir Walter Scott had to dispose of an action against James Hogg, Eltrieve Lake, better known as The Ettrick Shepherd. Looking to the relations between them, it cannot have been altogether a pleasant duty for the judge, more especially as it was necessary to decide the case against the defender. The case is set out fully in the Appendix (No. 107). It proceeded at the instance of Walter Cunningham, Catslackburn, and concluded for payment of £31, 17s. 10d., as shown in an account produced, incurred for sheep and the cost of grazing. Hogg's defences are long. In effect, he maintained that he "did not owe the pursuer a farthing." Cunningham lodged answers (which do not spare Hogg!) and produced certain letters addressed by Hogg to him. The Sheriff himself wrote the judgment in the case, although it is signed by the Substitute. The number of process on which it is written is much worn and much torn, so that part of the interlocutor has disappeared.

"SELKIRK, *30th May* 1821.—The Sheriff-Substitute having advised with the Sheriff-Depute, finds that prescription in this case is interrupted by the various acknowledgments in the correspondence produced that the debt is resting owing. Finds that there is no proof of Mr. Cunningham having accepted the composition proposed by the Defender in his letter of 5th February 1814, and that even his acceptance of that composition could not . . . or barred the pursuer from claiming the . . . which is therein specially reserved over and above . . . decerns in terms of the libel and finds expences due.

"(Signed) CHAS. ERSKINE."

THE RIGHT TO CAST FEAL AND DIVOT FROM THE TOWN COMMON

The Town Council of Selkirk, on 26th September 1817, passed a resolution that from that time forward no divots, feals, or sods should be cut or dug from the town common, "except for the purpose of covering houses or graves." In the following year the magistrates found it necessary to bring an action against one John Anderson, a tanner in the town, to have him interdicted "from casting or digging divots, feals, or sods from that part of the town common called 'The Cow Gang' for the purpose of coping his dykes." Anderson contended that he had a servitude right of doing as he did—"a privilege enjoyed by the Burghesses from time immemorial, not only for the purpose of covering houses and graves, but also for coping dykes"—and that this right could not be taken away or limited by any act or resolution of the Town Council. Sir Walter Scott's first deliverance in the matter was as follows:—

"SELKIRK, 30th *December* 1818.—The Sheriff-Depute having advised this process, and being of opinion that a point of so much consequence to the Burgh should be determined upon full pleadings, appoints the parties to lodge mutual Memorials within one month from this date, and recommends that the same be drawn by counsel.

"(Signed) WALTER SCOTT."

The memorials were lodged, and were studied. The case was decided thus:—

"SELKIRK, 31st *May* 1820.—The Sheriff-Depute having advised these Memorials, Finds that the Act of Council dated 26th September 1817 is a legitimate and prudent Act of Authority on the part of the Magistrates of Selkirk, tending by a proper restriction of the servitude of feal and divot to prevent the subject from being wasted and deteriorated, therefore continues the Interdict;¹

¹ *Interim* interdict had been granted by the Honorary Sheriff-Substitute, Mr. Borrowman, on 18th April 1818.

Finds the Respondent liable in ten shillings penalty and in expense of process, but in no further damages, and Decerns.

“(Signed) WALTER SCOTT.”

The defender appealed, by reclaiming petition, against the granting of expenses—unsuccessfully.

“SELKIRK, 9th August 1820.—The Sheriff-Depute having heard this petition with Answers, refuses the same in respect damages always carry expenses, But refers to the Court to modify the Accompt of expenses when lodged, in respect of Mr. Anderson’s plea of *bona fides*.

“(Signed) WALTER SCOTT.”

AN APPRENTICE'S CLAIM FOR DAMAGES

A protracted case regarding the right of an apprentice to damages originated in 1824. George Chisholm, weaver in Galashiels, for his son Joseph Chisholm, a minor, raised an action against James and Henry Brown, clothiers in Galashiels, for damages for dismissal. The pursuer alleged that Joseph became indentured to the defenders for a term of four and a half years, with wages at the rate of 4s. per week in name of board for the first three years, and 5s. per week for the remaining year and a half, and also an equal share with the other apprentices of the machine-room flocks; with also cloth for a coat, vest, and two pairs of trousers. After being four weeks in the defenders' service, for which he received 4s. weekly, Joseph was induced to board with the defenders; and in addition to the above articles of clothing he was promised a pair of boots yearly. He stated that after being some time longer in the service he was dismissed. The defenders in their answers stated that no written indenture was entered into, and that the pursuer was only taken on trial, as was the custom in Galashiels. At a later stage they further stated that the pursuer's conduct was unsatisfactory. The first interlocutor (of which a part is torn and illegible) was as follows:—

“SELKIRK, 24th *March* 1824.—The Sheriff-Depute having considered this Process, Finds it is not denied that the formal terms of an Indenture were fixed on between the parties and that it was acted upon for six months on both sides—finds that the Defenders have alleged no sufficient cause for resiling from their agreement therefore appoints them to enter into such an Indenture . . . the boy in terms thereof and Decerns.

“(Signed) WALTER SCOTT.”

The defenders appealed, with this result:—

“SELKIRK, 21st *July* 1824.—The Sheriff-Depute having advised this Petition and Answers adheres to the Interlocutor reclaimed against.

“(Signed) WALTER SCOTT.”

At this stage the defenders alleged that the pursuer's conduct was so unsatisfactory that they were justified in dismissing him. This judgment followed:—

“SELKIRK, 15th December 1824.—The Sheriff-Substitute having advised with the Sheriff-Depute, finds that the allegations that the apprentice was idle, incapable in a degree approaching to idiocy, lazy, and disobedient, are habile reasons for dismissing him and may be admitted to proof. But in respect that they are not stated in the original Defences finds that the Petitioners can only be admitted to a proof thereof upon making payment of all the expenses incurred in process previous to the date of the Petition.
“(Signed) CHA. ERSKINE.”

These allegations as to conduct were given up by the defenders when they were called upon to prove them. Sir Walter then pronounced the following interlocutors:—

“SELKIRK, 9th March 1825.—In respect the Minuters have departed from their assertions in point of fact, or at least declined to substantiate them by proof, the Sheriff-Substitute having advised with the Sheriff-Depute recalls the Interlocutor of 15th December and adheres to that of twenty-fourth March Eighteen hundred and twenty-four.

“(Signed) W. SCOTT.”

“SELKIRK, 11th July 1827.—The Sheriff-Depute of new ordains the Defenders to receive the Pursuer into their service upon his entering into an Indenture with a cautioner¹ conform to the Interlocutor of 24th March 1824 and appoints the said Indentures to be executed within a month from the date hereof under certification that the Sheriff will otherwise renew consideration of the question with a view to damages.

“(Signed) WALTER SCOTT.”

The pursuer presented a reclaiming petition asking damages.

“SELKIRK, 26th September 1827.—The Sheriff-Depute appoints this Petition to be seen and answered on the point how far damages ought in the present case to come instead of performance of the contract.
“(Signed) WALTER SCOTT.”

¹ *I.e.* Guarantor.

"SELKIRK, 7th November 1827.—The Sheriff-Depute having advised this Process finds the Respondents Messrs. Brown liable in Five Pounds as damages corresponding to the lad's being out of work from Twenty-first January 1824 to 9th March 1825 and also in payment of expenses of process down to that day, But in respect of the circumstances finds them liable to no further damages or expenses. “(Signed) WALTER SCOTT.”

The defenders appealed by reclaiming petition. Thereupon the protracted suit was finished by this judgment:—

"SELKIRK, 23rd July 1828.—The Sheriff adheres to the Interlocutor reclaimed against, and of new decrees for the modified sum of expenses in name of Walter Hogg, agent for the Pursuer, during the period of litigation for which expenses are found due and disburser thereof. Finds the Defenders liable in three guineas of expense as their proportion of Expence of Extract and Decerns.

“(Signed) WALTER SCOTT.”

A POACHER'S ASSAULT CASE

In 1827 John Gordon, a labourer in Bridge End, presented a petition to the Sheriff, stating that, on 16th October 1826, "within the jurisdiction of your Lordship's Court," he was assaulted by James Fletcher, gamekeeper, Bowhill, and another person unknown, and that his gun was forcibly taken from him by the unknown person at the desire of Fletcher. He craved that the gun should be returned to him, and that Fletcher should be found liable in £20 damages for the assault. Gordon admitted frankly that he was poaching at the time of the assault, and, further, that he had been fined £10 by the Commissioners of Supply for carrying a gun without a licence. Fletcher pleaded that "the pursuer could not sue without the consent of the procurator-fiscal, and that the *locus delicti* was too generally specified." After a condescendence and answers, the Sheriff issued the following interlocutor. Notwithstanding that in form it is a deliverance by the Sheriff-Substitute, it was written and signed by Sir Walter Scott, and the Sheriff-Substitute (now Mr. William Scott, for Charles Erskine was dead) had no hand in it.

"SELKIRK, 11th July 1827.—The Sheriff-Substitute appoints parties to revise their condescendence and Answers for the purpose of stating the hour of the night or morning upon which the transaction took place as alleged, and also to state more explicitly the fact whether the gun is returned or not, and in whose custody it now is. Thereafter appoints parties to say whether they hold the record as closed.

"(Signed) W. SCOTT."

The final judgment (again in Scott's handwriting) in the case was :—

"SELKIRK, 20th February 1828.—The Sheriff-Substitute having advised with the Sheriff-Depute, and the pursuer having brought no proof to show that the gun was taken from him after that

period in the morning when he might have been lawfully apprehended and disarmed,¹ refuses the prayer of the petition, and finds the respondent entitled to expenses.

“(Signed) W. SCOTT.”

¹ Under Act 57 Geo. III. cap. 90—now 9 Geo. IV. cap. 69, as amended by 7 & 8 Vict. cap. 29—against Night Poaching.

SIR WALTER SCOTT'S LAST INTERLOCUTOR

The last interlocutor which Sir Walter Scott wrote as Sheriff of Selkirk is dated 7th December 1831. The case of which it disposed was an action for £16, 10s., being the balance of the price of turnips sold by Thomas Douglas, Earlston, to Alexander Cunningham, farmer, Carterhaugh, in which farm, presumably, the defender had succeeded the litigious Mr. Park. The account was dated January 1827, and the action was not raised until more than three years later. The defender, therefore, pleaded prescription, just as Mr. Park would have done. The first interlocutor was :—

“SELKIRK, 20th October 1830.—The Sheriff repels the defence of prescription, Appoints the cause *quoad ultra* to be conducted according to the rules of the Small Debt Act.

“(Signed) WALTER SCOTT.”

“The Sheriff will attend on Wednesday 27th inst., to try this cause.

“(Initialed) W. S.”

After the hearing thus arranged, the following interlocutor was pronounced :—

“SELKIRK, 27th October 1830.—The Sheriff recalls the interlocutor of 20th October, and Appoints the pursuer to state his cause in a Condescendence according to the Act of Sederunt, and the Defender to see and answer the same in common form.

“(Signed) WALTER SCOTT.”

As the limit in money value of small debt actions was at this time £8, 6s. 8d.,¹ the ground of the interlocutor of 20th October is not apparent. The pleadings ordered were duly lodged; and the Sheriff thereupon issued this further interlocutor :—

“SELKIRK, 30th March 1831.—The Sheriff finds that as no

¹ Act 1829, extending this limit from £5 under Act of 1825 to one hundred pounds Scots (£8, 6s. 8d.).

proof is offered by Oath or writing to show that the balance of the Account pursued for under the same is (not)¹ Prescribed, therefore Assolzie the Defender, and finds him entitled to expenses, saving to the pursuer his lodging a reference to oath of party.

(Signed) WALTER SCOTT."

The next interlocutor is inconsistent with that just quoted, and it was not proceeded on. The most likely surmise is that the Sheriff, having reason (it may be from some verbal statement) to anticipate that a reference to oath would be proposed, was providing for contingencies by the remit to skilled men. It was in these terms:—

"SELKIRK, 29th June 1831.—The Sheriff-Substitute having advised with the Sheriff-Depute, Remits to two practical farmers, one to be suggested by each party, with power to name an Oversman, to report to the Sheriff whether the Account in question is justly charged and according to the custom of the county.

(Signed) WALTER SCOTT."²

The pursuer, by reclaiming petition, appealed to the Sheriff to reconsider his judgment of 30th March. Then Sir Walter wrote his last interlocutor. It is as follows:—

"SELKIRK, 7th December 1831.—The Sheriff-Substitute having considered the Reclaiming petition for the pursuer with the Answers thereto and whole process Refuses the crave of the Petition and adheres to the Interlocutor of 30th March last.

(Signed) W. SCOTT."²

Note.—Had there been no other transaction between the parties except that which has given rise to the present dispute then the quinquennial, and not the triennial, prescription, would have applied—the former being applicable to all single transactions or bargains concerning moveables, while the latter applies to articles arising in a course of dealing between parties. Now here the pursuer not only furnished the Defender's sheep with pasturage in terms of the written agreement in process, but also with three acres of turnips for which the Defender paid, and with which

¹ The omission of this negative is a clerical error.

² It will be noted that both of these interlocutors, though formally bearing to be those of the Sheriff-Substitute, are signed by the Sheriff.

accordingly he is credited in the account libelled on. The claim for the additional turnips therefore was not a single transaction, but merely one of the articles, arising in this course of dealing between them.

“As to the date from which prescription runs, the best evidence as to this is the account rendered by the pursuer himself which is dated in January 1827, and counting from this date it is clear that more than three years had elapsed before the action was raised.

“(Signed) WALTER SCOTT.”

APPENDIX

APPENDIX

Containing a list of all the cases in which Sir Walter Scott pronounced judgment. Those cases which are not fully described in the foregoing part of this book are set forth at length in this Appendix.

The arrangement here is in order of the date of the latest judgment pronounced in each case.

1.

1800.—*Agency: Terms of Employment.*

CHARLES BAXTER, merchant in Edinburgh, executor-dative¹ of the late Thomas Baxter, writer² in Melrose, *against* Several Debtors of the Defunct, for business accounts.

WILLIAM AITKEN, in Ashiestiel, lodged defences. He pleaded (1) that his account had prescribed, and (2) that special terms of “no purchase, no pay,” had been agreed to by the deceased. The judgment is in Sir Walter Scott’s handwriting, and is in these terms:—

“SELKIRK, 26th November 1800.—The Sheriff-Depute having considered the Defences and Answers repells the said Defences in as far as they are founded upon prescription, reserving to the Defender to undertake a proof of the special terms on which he employed the late Mr. Baxter, viz. that if the defender had no advantage, his agent was to have no pay; Finds he must further prove that *de facto* he had no advantage; and, failing his undertaking such proof, Decerns³ for the sum libelled,⁴ with full expenses, and allows an account⁵ to be given in.

“(Signed) WALTER SCOTT.”

The defender did not avail himself of the allowance of proof, and the case thus ended with judgment against him.

¹ Administrator.

² Solicitor.

³ To decern is to decree—to give judgment.

⁴ Set forth or specified in the summons.

⁵ An account of the pursuer’s expenses in the case.

2.

1800.—*Defamation : Competency of Action in Sheriff Court.*

JAMES RIDDLE, merchant in Selkirk, *against* ANDREW HENDERSON, writer in Selkirk.

This was an action for damages for defamation, and palinode.

The circumstances and the judgment are set forth at p. 24.

Sir Walter Scott dismissed the action on the ground that an action of scandal was not competent in the Sheriff Court. It must be pointed out, however, that at the time this judgment was pronounced such an action was competent in that Court. This was subsequently declared to be the law by a decision in the Supreme Court (*Forrest v. Crichton*, 12th December 1807, *Faculty Collection*, and Morison's *Dictionary*, Appendix, Jurisdiction, 18). An early decision had apparently been read as being to the contrary effect (January 1745, 5 Brown's Supplement, 741; see also *Pitcairn v. Webster*, 18th July 1712, 4 *ibid.* 911). From the case of *Forrest* it appears that actions of scandal were entertained in other sheriffdoms.

The jurisdiction of Sheriffs, as such, extended in these cases only to awarding damages for loss and as *solatium*. As Sheriffs it was not competent for them to give decree for palinode or recantation; that remedy was still part of their consistorial jurisdiction as Commissaries (see John Borthwick's *Treatise on Law of Slander in Scotland*, 1826, pp. 48 *et seq.*; also *Turner v. Cuthbert*, 1831, 9 Shaw, 774). It may have been to this conclusion for palinode that Sir Walter Scott was referring when he dismissed the above action.

3.

1801.—*Averments Derogatory to the Court.*

GAVIN POW AND OTHERS, all labourers in Selkirk, *against* THOMAS HYND, "road undertaker" or contractor in Selkirk. An action for £8, 1s. 3d., said to be due as wages. Decree was granted, without allowing a proof. Hynd presented a reclaiming petition to the Sheriff-Depute appealing against this interlocutor. In the course of the petition the defender stated that "he cannot help feeling that your lordships have paid more attention to the assertions of the pursuers than his, which he apprehends were equally entitled to credit." He

maintained that the Court ought merely to have allowed them a proof. In order to show this, "and to hold up to ridicule a contrary doctrine, let it be supposed that these pursuers, to whose assertions and *ipse dixit* your lordships seem to pay so much credit, had libelled the petitioner for double the price of the work in question, then your lordships upon the same principle would have been well founded in decerning in that case as well as the present."

The interlocutor and note, in Scott's handwriting, are as follows:—

"SELKIRK, 5th August 1801.—The Sheriff-Depute having considered this petition and Answers, refuses the prayer of the said petition, and adheres to the Interloq^r. reclaimed against.

"(Signed) WALTER SCOTT."

"The Sheriff must observe that some parts of this petition are very improperly expressed; as this is the first instance of the kind which has occurred and as the Sheriff is unwilling to suppose any disrespect was intended, he is contented to pass over this circumstance under certification¹ to the practitioners that if in future a passage shall occur in any paper which shall appear derogatory to the Court, he will not only order the paper to be withdrawn, but accompany his censure with a suitable fine."

4.

1803.—*Betting: Contra Bonos Mores.*

JOHN DEWAR, dancing-master in Selkirk, *against* JOHN ROME, *vintner* in Selkirk.

Action for payment of a bet.

The circumstances and the judgment are fully set forth at p. 12.

5.

1803.—*Action for Wages.*

ANDREW BOWER, residing at Selkirk Loanhead, *against* HENRY GILL, butcher in Galashiels.

Action for recovery of wages due to pursuer for assisting to exhibit "a wonderful cow."

The circumstances and the judgment are fully set forth at p. 16.

¹ The assurance that a certain course will be followed on failure to comply.

6.

1804.—*Boundary ; Encroachment.*

EBENEZER CLARKSON, Selkirk, *against* GEORGE DOBSON. This was a dispute regarding the mutual boundary of two properties. The facts sufficiently appear from the interlocutor, which is as follows :—

¹“19th April 1804.—The Sheriff having considered these memorials and having personally visited the premises in presence of both parties finds that there does appear to have been a trifling encroachment of nine inches or more upon Mr. Clarkson’s property, finds that this seems to have taken place from the tacit understanding of parties when Mr. Clarkson’s new Gable (*sic*) was built and therefore that Mr. Dobson was *in bona fide* to enlarge his kitchen to the above extent, but that Mr. Dobson must nevertheless pay a reasonable equivalent for this accommodation, which the Sheriff rates at the sum of £12, 15s. 10d. being one half of the expenses of erecting the Gable of which he shares the benefit, and Decerns against the said Dobson in payment of that sum, with Two guineas more in name of damages and expenses, also for the expense of Extract. (Signed) WALTER SCOTT.”

Note.—“It is not the intention of this Interloq^r. to declare the Gable mutual or to make any alteration in the state of property which indeed cannot competently be done in this action.”

7.

1804.—*Hypothee: Sequestration.*

SIR JAMES PRINGLE, of Stichel, Bart., *against* DAVID MURRAY, tenant of Newhill, in the parish of Stow and county of Selkirk. This was a Petition by a landlord for Sequestration, under the agricultural hypothee, of as much of the crop, stock, and implements on the defender’s farm as would completely satisfy one half-year’s rent past due and furnish security for one half-year’s rent which would fall due. The defender tabled claims for compensation under his lease. The first interlocutor (in Sir Walter Scott’s handwriting, dated and signed by Mr Erskine) is in these terms :—

¹ Place omitted.

“SELKIRK, 25th May 1803.—The Sheriff-Substitute having consulted with the Sheriff-Depute, appoints the tenant to give a rectified state of his claims of compensation, instructing the same by vouchers in so far as they are disputed by the landlord, and producing along with the said state the tack itself, that it may appear plainly what was the extent and nature of the allowances to be made to the tenant, and that against next Court day.”

This the tenant must have failed to do to the satisfaction of the Court, for there follows this judgment (again in Sir Walter's handwriting, but signed and issued by Erskine):—

SELKIRK, 6 July 1803.—“The Sheriff-Substitute having consulted with the Sheriff-Depute, finds that the defender has failed to obtemper in an explicit manner the last Interloq. Therefore, grants Warrant for rousing¹ the Sequestered effects, reserving the tenant all grounds of compensation which he shall be able regularly to instruct on an accounting with the landlord; and in particular reserving to him his claim for building dykes in so far as the same shall be instructed by the report of² a sworn measurer, to whom the Sheriff (*sic*)³ remits (remits) to measure the dykes at the sight of parties or their agents, and to report. Also reserving the tenant's claim to grass mail⁴ of the Contractor's horses when the same shall be regularly instructed; also for lime in so far as he shall show (of which the receipt produced is no evidence) that the same has been laid upon the lands; also for cutting⁵ drains so far as the expense shall be regularly instructed and shall not exceed £12. Also for cauldling⁶ the Caddon Water⁷ in as far as he shall be able to prove his outlay. And in respect he has not complied with the order of Court finds him (*i.e.* the tenant) liable in the expense of the answers to the Minute.
“(Signed) CHARLES ERSKINE.”

The defender was dissatisfied, and at this stage carried the case, on

¹ Selling by public auction.

² Name left blank.

³ Sir Walter forgot when writing that, when issued, the interlocutor would be that of the Sheriff-Substitute.

⁴ The charge or rent for grazing.

⁵ This word is underlined.

⁶ *I.e.* laying a bed of loose stones from the channel backwards, to protect the land.

⁷ A tributary of the river Tweed.

appeal, to the Court of Session by a Bill of Advocation. It was returned, in the spring of 1804, to the Sheriff Court for "proof," by a remit from the Lord Ordinary. This interlocutor, in Scott's handwriting and signed by him, was pronounced:

"SELKIRK, 20th June.—In obedience to the order of the Supreme Court, allows the Defender to prove certain items in his Account.
 "(Signed) WALTER SCOTT."

Instead of leading evidence, the defender produced several accounts and measurements only. Answers were lodged to these on behalf of the pursuer. To his answers the defender replied at great length. There were duplies for the pursuer. By a docquet on one of the numbers of process, the defender's agent then "gave up the idea of the half year's rent from Martinmas 1802 to Whitsunday 1803 being paid." The following interlocutor (written by Sir Walter and signed by him) was issued disposing of the case:—

"SELKIRK, 8th August 1804.—The Sheriff having considered this proof, finds 1^{mo}/ that after deduction of 88 Bolls of Lime the quantity necessary to build the Onstead from the gross quantity driven by the Defender Murray there remains enough laid upon the land to found him in his claim of Twenty-five pounds upon that head, and finds him entitled to retention of the said sum accordingly. 2^{do}/ Finds the extent of new built dyke to be, according to Mr. Fairbairn's Measurement, 252 Roods or thereby, being at 4s. 6d. per rood the sum for which a contractor offered to take the work, £46, 14s.; finds the extent of the rebuilt dykes to be about 32 Roods, which at 2s. 9d. per rood, the rate offered by the contractor for such work, is £4, 8s., of which sums the Sheriff hereby authorizes retention. Finds that the extent of 2 feet drains is about 379 Roods, which at 7d. per rood is £11, 1s. 1d.; and that the extent of the 1 foot drains is 67 Roods or thereby, which at 1d. per rood is 5s. 7d., of both which sums deduction is also allowed to the Tenant by this Interloq. Finds that the Defender has led no evidence for instructing his other claims of compensation for Banking the Caddon Water and feeding the Contractor's horses. Therefore decerns against him for balance of the rents, deducing (*sic*) the sums hereby sustained in compensation, And of new grants Warrant to sell the sequestrated effects, each party paying his own expences.
 "(Signed) WALTER SCOTT."

As I have already noticed, there is no interlocutor sheet in these cases—no separate document containing the successive judgments pronounced in the case—such as the present practice requires. In this process in particular the absence of such a separate sheet is very confusing. The judgments appear on different documents in the process, and are written at any place where it appeared to Sir Walter when he *began* to write that there would be space sufficient for the interlocutor. But it generally proved to be longer than he anticipated, and accordingly it overflows into odd corners, and, in the case of one, round the “backing up” writing on the outside.

8.

1804.—*Lease: Petition by Incoming Tenant for Authority to Ingather Crop.*

JOHN THORBURN, tenant of Chapplehope, petitioner. A petition for authority to cut and gather in the crop on the farm of Chapplehope, the outgoing tenant (Walter Laidlaw) having sown part of the land in tillage, contrary to the provisions of his tack.

The Sheriff pronounced the following interlocutor:—

“SELKIRK, 4 October 1804.—In respect the Season is far advanced, the Sheriff grants the prayer of this petition, giving warrant to the petitioner to reap the crop upon the farm, keeping a strict account of the same as well as of the expenses of Ingetting. The Sheriff directs that this Interlocutor be intimated to Mr. Laidlaw before commencing the cutting down, that he may have an opportunity of inspecting the manner in which the ingetting is carried on.
“(Signed) WALTER SCOTT.”

9.

1805.—*Damages for Destruction of Trade Banner.*

WILLIAM THORBURN, tailor in Selkirk, Deacon of the Incorporation of Tailors, and JOHN PATERSON, tailor there, his colleague, *against* ANDREW BROWN, journeyman tailor in Selkirk.

Action against the defender, who was alleged to have torn and destroyed the Standard of the Incorporation, to have him ordained

either to furnish a new standard, or to pay to the Incorporation £20 as the value thereof.

The circumstances and judgments are fully set forth at p. 18.

10.

1805.—*Master and Servant : Desertion of Service.*

WILLIAM LAIDLAW, writer in Peebles, *against* AGNES SCOTT, Selkirk. Action to compel the defender, a domestic servant, who had deserted her service, to return, under penalties.

The circumstances and judgment are fully set forth at p. 22.

11.

1805.—*Roads : Toll : Liability to Duty.*

HELEN WATERS, keeper of Howden Potburn Toll, *against* JOHN ANDERSON, Ettrickbridge, and his servant.

An action for 1½d. of toll duty for a cart of lime. The defender's servant alleged that the lime with which the cart was loaded was to be laid upon the land, for fertilising purposes, and therefore was entitled to pass free of toll duty, whereas the pursuer contended that it was to be used for building purposes, and was therefore liable to the duty sued for.

The Sheriff decided the matter by the following judgment:—

“SELKIRK, 4th September 1805.—The Sheriff having considered this process finds that although there seems to have been no actual intention of fraud on the Defender's part, a false allegation was made by his servant: Therefore finds him liable in the mitigated penalty of five shillings and in expenses of process, modifies the same to ten shillings, and decerns.

“(Signed) WALTER SCOTT.”

12.

1805.—*Master and Servant : Desertion : Marriage of Servant.*

GILBERT CHISHOLM, Esquire, of Stirches, *against* CATHERINE WILSON, wife of Robert Nichol, Howcleuch, and the said ROBERT NICHOL.

Action of damages for desertion of service by a female servant who was married immediately after the desertion.

The circumstances and judgment are set forth at p. 22.

13.

1805.—*Sale : Horse : Warranty : Unsoundness.*

ANDREW OLIVER, carter in Jedburgh, *against* GEORGE HALL, Sunderland Hall.

Action for repetition of the price of a mare sold by the defender to the pursuer, in respect that she was suffering from glanders when sold, although declared to be sound. After a proof the Sheriff pronounced this interlocutor disposing of the case:—

“SELKIRK, 4th September 1805.—The Sheriff, having considered this process with the proof led, finds that though the horse in question may not have been actually glandered (as in that case she could hardly have been resold) yet she must have been unsound at the time of sale: Therefore finds the defender liable in six guineas damages, and in expenses of process.

“(Signed) WALTER SCOTT.”

14.

1805.—*Landlord and Tenant : Fore-Rent.*

ANDREW HENDERSON, writer in Selkirk, *against* GEORGE PARK, tenant in Carterhaugh.

Action by landlord against tenant to have it determined when, under the lease, the half-yearly rent of agricultural subjects fell due.

Henderson had, by missive, sublet to Park the northmost inclosure of the South Common of Selkirk. The judgment, in Sir Walter Scott's handwriting, is:—

“SELKIRK, 20th November 1805.—Having considered the petition, answers, and replies, the Sheriff finds that by the Missive, which is the only evidence of the bargain betwixt the parties, Mr. Park is bound to pay what is called *fore-rent*. The year's rent paid at Whitsunday 1804 was therefore the consideration for crop 1804, and the (the) two payments at Mart^s. 1804 and Whitsunday 1805 became the rent for crop 1805; the two payments at Martinmas 1805 and Whitsunday 1806 will constitute the rent for crop 1806, and so forth untill the half-yearly payments at Martinmas 1811 and Whitsunday 1812 which make the crop for 1812, the last year of Mr. Park's possession. In this manner

the tenant pays no more than one year's rent for every crop, although it is paid *before harvest* agreeable to the Missive. The Sheriff, therefore, finds that the receipt for the half-year's rent payable at Whitsunday last ought to bear that the payment is 'in full of the rent for crop and year eighteen hundred and five,' and Decerns accordingly, each party paying his own expenses, and Mr. Park that of Extract.

"(Signed) WALTER SCOTT."

15.

1805.—*Assault: Damages.*

BETTY STEVENSON, servant to George Currey, Esquire, of Greenhead, with concurrence of the Procurator-Fiscal, *against* NELLY BROWN, servant to John Anderson, Senior, burgess in Selkirk.

A criminal complaint, combined with a civil claim for damages, for assault. In the case there was a successful appeal to the Circuit Court at Jedburgh.

The circumstances and judgments are fully set forth at p. 27.

16.

1805.—*Partnership: Count and Reckoning.*

HUGH GOODFELLOW *against* JOHN ALLAN.

This was an action for count and reckoning arising out of a co-partnery in a hosiery business in Selkirk. The pursuer, who was not skilled in the particular line of business, seems to have contributed money and to have left the management to the defender. Neither the facts nor the deliverances (of which there are several) are of any interest. The latter are in the handwriting of the Sheriff-Substitute, but bear to be issued after he has "advised with the Sheriff-Depute."

17.

1806.—*Refusal to Supply Post-Horses.*

SIR JOHN B. RIDDELL *against* JAMES DUN, vintner in Selkirk.

Action for damages and complaint for penalties for refusing to supply post-horses for longer than one day.

The circumstances and judgment are set forth at p. 47.

18.

1807.—*Tweed Fisheries Act : Contravention.*

JAMES PRINGLE, Esquire, of Torwoodlee, with concurrence of the Procurator-Fiscal, *against* WALTER BALLANTYNE, JAMES ROBERTS, ROBERT YOUNG, WALTER BLAIKIE, and GEORGE FAIRGRIEVE, all of Galashiels.

This was a petition against the respondents for trespass on the lands of the private complainer, and for having “with a large poke net swept the water of Gala of large quantities of the spawn fry or young brood of salmon-gilses, salmon-trout, or whiting, for several miles on 16th June 1806 contrary to 37 Geo. III. cap. 48, s. 10 (Tweed).”

The defenders denied killing “the spawn fry or young brood of salmon-gilses, salmon-trout, or whiting,” but “admitted killing Common Trout and that they had often witnessed that amusement followed in the same way as they took it without any challenge made, especially by Lord Lauderdale’s factor, who did it openly and avowedly, and they conceived that his lordship, whose legal knowledge will not be disputed, would not have tolerated a practice in his factor which was diametrically opposite to An Express Enactment of the Legislature ; That so far as any Act of Trespass was concerned they kept themselves within Water Mark which is well understood to be common ground. That in small streams like Gala foul fish only spawn in them at one particular period and that so very early in the season, that the spawn fry are all off with the first fresh floods about the end of April or beginning of May, and to fish for them at the time condescended upon in the Complaint would be as hopeless a task as grappling for a needle in a haystack.” The following interlocutor (in Scott’s handwriting) was issued :—

“SELKIRK, 28th January 1807.—The Sheriff-Substitute having consulted with the Sheriff-Depute Before answer Allows the pursuers a proof of their libel and the Defenders a conjunct probation as accords.

“(Signed) CHAS. ERSKINE.”

After proof, the decision was given in the following judgment and note, which are in the handwriting of Sir Walter Scott :—

“SELKIRK, 8th July 1807.—The Sheriff-Substitute having advised with the Sheriff-Depute fines and amerciates the Defenders in the sum of Ten shillings each and Decerns therefor

and for the expenses of process of which allows an account to be given in. (Signed) CHAS. ERSKINE."

Note.—The Sheriff-Depute does not consider the statute as strictly applying to this case. But the use of *herry-water nets*, the effect of which is to destroy almost all the fish of every sort which are in a brook or river, is illegal at common law; besides the trespass on the grounds of the private complainer admitted in the defences, especially committed with such a purpose, is also punishable. As the defenders may, however, have been ignorant of the nature of their trespass, the Sheriff has so limited the fine that it may serve for a warning rather than punishment. But if similar instances shall occur it will become necessary in future to inflict a more severe penalty.

[It will be observed that the note bears to be by the Sheriff, although the interlocutor to which it is appended is in form that of the Substitute.]

19.

1807.—*Agency : Accounting.*

MARGARET LANG *against* JAMES THORBURN and also against RODGER and PATERSON, writers, Selkirk.

By a long letter addressed to Walter Scott, Esq., Principal Clerk of Session, North Castle Street, Edinburgh (postage 8d. paid), Margaret Lang complained that Messrs. Rodger and Paterson retained certain moneys received from the defender, Thorburn, in payment of an alimentary decree granted against him in her favour.

The interlocutor and note (in Sir Walter's handwriting) were as follows:—

"SELKIRK, 9th December 1807.—The Sheriff-Substitute having advised with the Sheriff-Depute finds that the acknowledged Balance of one pound nine shillings must be instantly paid to the pursuer and Decerns Before answer further and as to expenses Appoints the account due by Thorburn to the Defender to be lodged in process. (Signed) CHAS. ERSKINE."

"The Sheriff-Depute recommends to Messrs. Rodger and Paterson an amicable settlement in this case."

[In this case also the note bears to be that of the Sheriff, although in form the interlocutor is by the Substitute.]

20.

1808.—*Lease : Renunciation.*

ANDREW HUNTER, tenant in Netherbarns, *against* JAMES HUNTER, tenant in Kilnknow.

This was an action regarding the disputed renunciation of a lease by one of the parties thereto.

The judgment (in Sir Walter's handwriting) was as follows:—

"SELKIRK, 8th June 1808.—The Sheriff-Substitute having advised with the Sheriff-Depute and having considered this Summons with Defences and all that has followed thereon, also the counter Lybel at the instance of James Hunter with Defences and Answers Conjoins the two processes and Finds that the Missive Letter dated Twenty-ninth September Eighteen hundred and three contains a valid and subsisting obligation on Andrew Hunter therefore ordains him to implement the same by executing in terms thereof a formal Renunciation and Assignment of the Lease of Kilnknow in favour of James Hunter he always finding caution to free and relieve him of the obligations of the lease in terms also of the said Missive and Decerns finds Andrew Hunter liable in expences and allows an account thereof to be given in.

"(Signed) CHAS. ERSKINE."

21.

1808.—*Sale : Price : Sheep : Condition on Delivery.*

DONALD STUART, residing at Hunthill, Roxburghshire, *against* JOHN LITTLE, farmer in Helmburn, Selkirkshire.

This was an action for £7, being the balance of the price of 199 sheep wedders sold to the defender by the pursuer.

The defender alleged that on examining the wedders on the day following their arrival in Edinburgh he found they had been very badly used on the road, and were "in such a worn-out and abused condition that they were almost unfit to be exposed to sale in the public market," and he accordingly refused payment of the balance to the pursuer.

The interlocutor is in Sir Walter's handwriting:

"SELKIRK, 17th August 1808.—The Sheriff-Depute having

considered the Condescendence Answers and whole cause Finds that the price at which the first parcel of sheep were sold differs so little from that at which the second parcel driven by the pursuer's own servant were disposed of, as to exclude the idea of their having been misused in the manner stated in the Defences, therefore and in respect the Defender or his brother took the sheep off the pursuer's hands without complaint finds him liable in payment of the balance of Seven pounds sterling but finds no expenses due.

“(Signed) WALTER SCOTT.”

22.

1808.—*Marches: Disputed Boundary.*

J. R. JOHNSTONE, Esquire, of Alva, *against* JOHN BOYD, Esquire, of Broadmeadows.

This was an action as to the building of a march dyke¹ between the lands of Lewinshope, belonging to Mr. Johnstone, and the lands of Broadmeadows, belonging to Mr. Boyd; and also as to fixing the line of the march.

The case is referred to *supra*, at p. 51.

The following are the deliverances (all in Sir Walter's handwriting) in the case:—

“SELKIRK, 17th August 1807.—The Sheriff-Depute having considered the Report, objections, and Answers, agreeable to the request of the objector, will visit and perambulate the Marches in presence of the parties, and for that purpose Appoints parties to meet him at Penmanscore upon Monday the twenty-second current at eleven o'clock forenoon.

“(Signed) WALTER SCOTT.”

“SELKIRK, 18th August 1808.—The Sheriff interdicts and discharges any further proceeding in building the March Dyke within mentioned until the line of March shall be finally settled and approved of.

“(Signed) WALTER SCOTT.”

“SELKIRK (no date).—The Sheriff-Depute having visited the March in question in presence of the parties and their Agents Approves of the March Dyke as erected so far as the second or

¹ Boundary wall.

westernmost gap where it crosses Lewinshope Burn but disapproves of the intended line of March Dyke from the said point as rendering necessary a very large and unusual excambion of property which may be avoided in great measure by keeping nearer to the original March of the farm and appoints parties to attend with Mr. Kinghorn the surveyor on next at the place called the ferkings where the Sheriff will proceed to lay down the line of March at the sight of all parties.

“(Signed) WALTER SCOTT.”

Note.—“It is not the Sheriff’s intention to throw the slightest blame on the respectable farmers who concurred in reporting upon the line of March now to be altered. He presumes the proposed excambion recommended by them to be perfectly fair, but as Mr. Boyd objects to so very considerable an alteration of the state of property, and as it seems plain that there is no absolute necessity for it, the Sheriff does not conceive it just to compel him to surrender his land even if the consequence were to be some improvement to the March of both farms.”

“SELKIRK, 2nd September 1808.—The Sheriff having again visited the March in dispute in presence of the parties and Mr. Kinghorn, Sworn Measurer, adjudges and decerns the March Dyke to be built upon the line now adjusted, namely, from a point of the dyke already built marked out by a heap of stones to the very point of the original March, at the March keeping as near the Brook as may be, and from that point up the Lewinshope side of the Burn, agreeable to Pits now dug, to an old tree about half-way up the Burn, there to cross to the Broadmeadows side and to run on that side agreeable to a line of Pits now dug, and to recross the said Burn to the Lewinshope side at a Pit now dug, thence to run slanting to the old line of Pits formerly laid down, and to keep that line to the top of the March at Penmanscore: Grants commission to Mr. Kinghorn to fix any farther marks which may be necessary for the more accurate ascertainment: Ordains the Dyke, so far as built without conformity to this line, to be taken down by Mr. Johnstone at his own expence, as erected without sufficient authority.

“(Signed) WALTER SCOTT.”

23.

1808.—*Road : Toll : Duty.*

JOHN USHER, in Toftfield, *against* THOMAS FAIRGRIEVE, keeper of Crosslee Toll.

This was an action to find the defender liable in repayment of certain toll duties wrongfully exacted, inasmuch as carts ought to be allowed to re-pass free of charge if back within twenty-four hours.

The circumstances and judgment are set forth at p. 42.

24.

1809.—*Water-Mill : Repairs : Ordinary or Extraordinary Stress of Water.*

THE BAILIES, DEAN OF GUILD, AND TREASURER OF SELKIRK *against* ALEXANDER HOPE and WILLIAM HOGG, masons there.

This was an action as to the cost of repairing the mason work of the water races and wall of Selkirk Mills. There had been a departure from the original plan of the work.

The following interlocutor (in Sir Walter Scott's handwriting) was issued :—

"SELKIRK, 9th March 1809.—The Sheriff-Substitute, having advised with the Sheriff-Depute, and having considered the petition, finds that by the original Contract the Respondents were bound to build the Mills in a substantial manner, and that a dispute which arose upon the doubt how far they had fulfilled this part of their bargain was settled by a subsequent contract by which they agreed to uphold the work as sufficient during the currency of the Lease; therefore finds that the Respondents are bound to repair all damage arising from ordinary causes, and particularly from such stress of Water as a mill of well-built and substantial work should have resisted without injury, but, on the other hand, that they are not bound to repair the injury arising from such an extraordinary flood as might have destroyed any building however substantial in the same situation; And in respect the burden of proof lies on the Respondents he allows them a proof of their defences, and the Petitioners a conjunct probation as accords, Appoints them before Answer to make such repairs

as are necessary to set the Mills going, reserving the question on which party the expence shall ultimately fall, under certification that, in case the respondents decline to do so, the Sheriff will name workmen to do so at the sight of both parties and of the Sheriff himself. “(Signed) CHARLES ERSKINE.”

A lengthy proof followed, but there was no subsequent interlocutor. Presumably the matter was settled out of Court.

25.

1809.—*Thirlage : Abstracted Multures.*

JAMES PRINGLE, Esquire, of Torwoodlee, and WILLIAM NEIL, tenant in Newmilns, *against* GEORGE WHITE, Caddonlee and Fernalee.

Action for abstracted multures (*i.e.* the dues for grinding corn, which the owner was thirled or taken bound to have ground at the pursuer's mill, but had not brought there to be ground).

The circumstances and judgments are set forth at p. 53.

26.

1809.—*Lease : Contravention of Terms : Acquiescence.*

THE MAGISTRATES OF SELKIRK *against* JOHN VEITCH, late tenant in Selkirk Mills, and DAVID MINTO, tenant in Linglie.

This was an action by the Town Council of Selkirk against John Veitch, the principal tacksman, and David Minto, his subtenant, for contravening the terms of the tack, by ploughing part of the lands. The following interlocutor (in Sir Walter's handwriting) was issued :—

“SELKIRK, 28th June 1809. — The Sheriff-Substitute having advised with the Sheriff-Depute, in consideration that the alleged contraventions of the Lease were carried on under the immediate observation of the pursuers and without challenge untill expiry of the Lease, and in respect that David Minto does not seem to have been a party to the Agreement between Veitch and the Town Council, therefore Assoilzies him from the present action and finds expenses due to him. But decerns against John Veitch for whom no defences have been lodged in terms of the Libell.

“(Signed) CHAS. ERSKINE.”

27.

1809.—*Building Contract: Supply of Wood.*

JOHN HEITON, wright at Philiphaugh, *against* EBENEZER CLARKSON, surgeon in Selkirk.

This was an action for the balance of an account for wood supplied for building a house. The Sheriff pronounced the following interlocutor (on No. 1 of process):—

“SELKIRK, 5th August 1807.—The Sheriff finds that the balance of the account of work done at Ovens Closs has been long since prescribed and therefore can only be proved resting owing by Mr. Clarkson’s writ or oath. Finds that the contract of 5th May 1803 does not exclude the pursuer from charging for extra wood furnished as alleged, provided the wood was actually so furnished and is charged at a reasonable price. Therefore remits to

at sight of parties to measure and examine the woodwork of Mr. Clarkson’s house and to report against

“(Signed) WALTER SCOTT.”

Note.—“The Sheriff strongly recommends to parties to resume their original intention of a submission to a neutral person of skill.”

The pursuer reclaimed, and the Sheriff pronounced the following interlocutor (on No. 5 of process):—

“SELKIRK, 17th August 1808.—The Sheriff-Depute adheres to the Interlocutor reclaimed against and Refuses the prayer of the Petition. Anew appoints the Defender to name a person of skill to concur with one named by the pursuer to visit and measure the extra work, and in case he declines to do so directs the Sheriff-Substitute to name such person to visit and report *quam primum*.

“(Signed) WALTER SCOTT.”

“SELKIRK, 18th January 1809.—In respect no tradesman is named on the part of Mr. Clarkson, the Sheriff-Substitute in terms of the directions given him nominates and appoints William Rodger, Wright in Hawick, to measure the extra work and visit and report agreeable to the above Interlocutor.

“(Signed) CHAS. ERSKINE.”

On objections being taken to the account of expenses, the Sheriff gave the following judgment (No. 11 of process):—

“SELKIRK, 29th November 1809.—The Sheriff refers these objections and answers to the Sheriff-Substitute to be taxed by him according to the Table of Fees. “(Signed) W. SCOTT.”

Note.—“The Sheriff desires that in future the Clerk will receive no reclaiming petition in which expenses are the point discussed, but parties will in future state their objections to such account verbally or by a short Minute to the Sheriff-Substitute that they may be advised instanter.”

28.

1810.—*Master and Servant : Apprentice : Bankruptcy of Master : Penalty under Indenture.*

THOMAS STODDART, eldest son of the deceased William Stoddart, with advice and consent of William Elliot, innkeeper in Selkirk, *against* ANDREW LANG, writer in Selkirk, and JAMES WATSON, schoolmaster in Selkirk, trustee and cautioner¹ respectively, on the sequestrated² estates of John Inglis, merchant in Selkirk.

Thomas Stoddart was an apprentice under indenture to John Inglis. During the currency of the apprenticeship Inglis became bankrupt, and his estates were sequestrated. Against his trustee (and his cautioner) Stoddard brought this action, in which he claimed (1) £12 sterling as the value of two suits of clothes with which Inglis had become bound to furnish him during the term of apprenticeship still to run; (2) £10 as the penalty incurred through the failure of the indenture; and (3) £20 as damages sustained on that account.

The case was disposed of by an interlocutor, written in Sir Walter's handwriting (on No. 2 of process), in these terms:—

“SELKIRK, 10th January 1810.—The Sheriff-Substitute having advised with the Sheriff-Depute, and having considered the whole case, Finds that, under all the circumstances, the pursuer's claim of damages must be restricted to the sum of ten pounds of penalty expressed in the Indenture, and that he must rank as a common creditor upon the Bankrupt estate of Mr. Inglis for the said sum of Ten Pounds, But that the Cautioner, James Watson, is liable to him for any deficiency that may occur; and in respect of the exorbitant overcharge finds no expenses due.

“(Signed) CHAS. ERSKINE.”

¹ *I.e.* guarantor or surety.

² *I.e.* bankrupt.

29.

1810.—*Tweed Fisheries Act ; Contravention ; Proof : Re-examination of Witness.*

GEORGE RODGER, Procurator-Fiscal of Court, *against* GEORGE DICKSON.

A complaint for fishing for fry of salmon, etc., by means of a creel.

There was a proof in the case. After its conclusion the procurator-fiscal applied to the Court, by minute, to have one William Spens re-examined, on the ground that he had obviously been reluctant to speak, and could give more information than had been obtained from him.

The judgment, in Scott's handwriting, was as follows :—

“SELKIRK, 10th January 1810.—The Sheriff-Substitute having advised with the Sheriff-Depute and having considered the proof, minute, and whole process, Refuses the prayer of the Minute, so far as it craves the re-examination of William Spens, as being *mali exempli*.

“Assoilzies the Defender from the conclusions of the Libel and Decerns, But finds no expenses due to either party.

“(Signed) CHAS. ERSKINE.”

30.

1810.—*Parent and Child ; Illegitimate Child : Custody.*

JANE WHITE *against* JOHN DICKSON.

Petition for delivery of an illegitimate child.

The judgment was in these terms :—

“SELKIRK, 10th January 1810.—The Sheriff-Substitute having advised with the Sheriff-Depute, In respect that the right of a mother to have the custody of an infant child cannot be forfeited by mere implication, finds that the Respondent, John Dickson, must deliver the child to the mother or those appointed by her to receive it, and will be liable in the aliment thereof from the date of said Delivery untill the child be seven years old, when he may resume the custody of it if he is so minded : Modifies the said aliment to four pounds Sterling, and Decerns, and for expences

which are to be limited to the Clerk's fees as no pro^r¹ has been employed for the Petitioner.

“(Signed) CHAS. ERSKINE.”

31.

1810.—*Process : Defences.*

GEORGE BLAIKIE, Esquire, of Langhaugh, *against* THOMAS SCOTT, cattle dealer, Hangingshaw.

This was an action for £10, the balance of the price of “Four Queys” sold to defender about twelve months prior to the raising of the action.

In his defences the defender denied “that he owes him any such balance. The price of the cattle was not absolute but conditional, and the defender has already paid the pursuer all that he ever agreed to pay him. He therefore craves to be assolizied with expenses.— In respect whereof.

“(Signed) ALEX. PARK.”

The Sheriff pronounced the following interlocutor (in his own handwriting) :—

“SELKIRK, 28th June 1809.—The Sheriff-Substitute having advised with the Sheriff-Depute and it appearing that the Defences *in causa* are totally vague and inexplicit appoints them to be withdrawn, and fines and amerciates the procurator in half a guinea, to be paid in to the Clerk of Court with the next full Defences, under Certification that if such defences are not lodged within six days the Sheriff will decern in terms of the libell.

“(Signed) CHAS. ERSKINE.”

The defender declined to state any further defences. The case was therefore disposed of by the Sheriff-Substitute (in Mr. Erskine's handwriting) :—

“SELKIRK, 7th February 1810.—Having again considered this process. In respect the Defender declines stating Defences *in causa* decerns against him in terms of the conclusions of the Libell: Modifies the expence to Two pounds ten shillings and tenpence stg. conform to particular acct., and also for the expence of Extract, and decerns.

“(Signed) CHAS. ERSKINE.”

¹ *I.e.* solicitor.

32.

1810.—*Church : Churchyard : Turf in Churchyard.*

CHARLES PATEN, minister of Ettrick, *against* WALTER SHIEL, day labourer there.

Proceedings, instituted by a letter to the Sheriff, to obtain interdict against “cutting and otherwise abusing the churchyard in order to cover new-made graves.”

The circumstances and judgments are fully set forth at p. 29.

33.

1810.—*Road : Toll : Complaint against Tollkeeper.*

GEORGE RODGER, Procurator-Fiscal of Selkirk, *against* WALTER SCOTT, keeper of Glendinning Toll-Bar.

Complaint against defender for having kept two passengers waiting for tickets, and for having allowed an obstruction close by the toll-bar.

The circumstances and judgment are set forth at p. 41.

34.

1804-1810.—*Sale Redeemably : Action for Order to Execute Disposition.*

ALEXANDER CUNNINGHAM, residenter in Selkirk, *against* WILLIAM RODGER, hosier there.

This case was raised in 1804 and was continued until 1810. It was ultimately an action for payment of £20 on a bill, and a counter-claim for £18, 8s. for lodgings, etc.; but originally it also concluded to have the defender ordained to execute a disposition of his garden.

The circumstances and the several interlocutors in the case are set forth at p. 57.

35.

1810.—*Building Contract : Measurements.*

WILLIAM DOUGLAS and ANDREW HOPE, masons in Selkirk, *against* WILLIAM EVANS, “taylor in Selkirk.”

Action arising out of a dispute as to the measurement of a building. The judgment was as follows:—

“SELKIRK, 22nd August 1810.—The Sheriff-Depute having resumed consideration of this process with the report of Mr. Alexander Kinghorn, Finds in terms of the said Report that the

“(Signed) WALTER SCOTT.”

1810.—*Sale : Price : Alleged Condition.*

The circumstances and judgment are set out at p. 67.

1810,—*Sale : Auction : Private Sale.*

An action for price of articles bought at a roup. The defence with regard to part of account not already paid to auctioneer was that the defender had paid it to town treasurer, who had put it to the pursuer's credit; defender's contention was that this sum was rightly so paid, because it had been incurred for purchase by private bargain of certain articles after they had been withdrawn from the public sale.

“SELKIRK, 13th October 1810.—In respect that there is now no cause between the parties who seem to have engaged in law from a misapprehension of each other's intentions, the Sheriff dismisses the Action, each party paying his own expenses.

"(Signed) WALTER SCOTT."

1810.—*Poor Law : Settlement : Child.*

The circumstances and judgments are fully set forth at p. 55.

39.

1811.—*Sabbath-Breaking.*

GEORGE RODGER, writer in Selkirk, Procurator-Fiscal of Court for the Public Interest, *against* GEORGE MERK and JOHN MERK, tenants in Mossilee; and JOHN MERK, Junr., son of the said John Merk, and ROBERT ANDERSON, their servants.

A charge of Sabbath-breaking, the said servants, it was averred, having travelled with two carts and four horses along the public road on a certain Sunday between the hours of 8 forenoon and 1 afternoon, when the lieges were decently going to church for the worship of God.

The circumstances and judgment are set forth at p. 37.

40.

1811.—*Defamation.*

ANDREW NICOL, merchant in Selkirk, *against* GEORGE TURNBULL, shoemaker there.

An action of damages for slander.

The circumstances and judgment are set forth at p. 25.

41.

1811.—*Road: Contract to make Road.*

ANDREW HENDERSON, collector of conversion money for Selkirkshire, *against* CHARLES CUNNINGHAM, tenant in Newhouse.

Action arising out of a bargain between the Road Trustees and the defender as to making of a road.

The judgment (in Scott's handwriting) was as follows:—

“SELKIRK, 13th March 1811.—The Sheriff-Substitute having advised with the Sheriff-Depute, Finds it incompetent to prove the alleged bargain as to the making of road between the Road Trustees and the Defender by the evidence of the Trustees or that of their Minutes, seeing that they are in a certain degree parties to the cause and have omitted to procure the farther written evidence of the bargain at the time it took place; Finds farther that the alleged verbal communings are too loosely stated to be a proper subject of proof; Therefore assoilzies the Defender and Decerns; Finds the pursuer liable in expenses of process and

"(Signed) CHARLES ERSKINE."

1811.—*Suspension of Sheriff-Officer.*

A petition was presented on behalf of the procurators (the solicitors) of the Court, praying that Dunlop should be reponed against the minute suspending him, on account of the inconvenience to the petitioners, there being only one other Sheriff-Officer in the county. The following deliverance (in Sir Walter's handwriting, the note being also *initialed* by him) was pronounced:—

“(Signed) CHAS. ERSKINE.”

"(Intd.) W. S."

1811.—*Tweed Fisheries Act: Contravention.*

Prosecution for taking fry. After a proof, the following interlocutor (written by Scott) was pronounced:—

"(Signed) CHARLES ERSKINE."

44.

1811.—*Sale : Sheep : Price.*

ROBERT ARRAS, tenant in Rink, *against* WILLIAM HUME, tenant in Hollybush.

This was an action to recover £10, 15s., being the balance of the price of fifteen score of lambs sold and delivered by the pursuer at St. Boswells Fair. The claim was stated with an account in which the lambs were entered at the price of 10s. each (£150), and credit was given for £139, 5s. as received (by bill £60; in cash £10; grass mail £3, 10s.; straw £2, 15s.; and a crop of beans £63). In defence it was stated that eighty-four lambs were not delivered at the fair, but later, and were to be charged at the price at the time of delivery. The pleadings are somewhat confused. The interlocutors (all in Sir Walter Scott's handwriting) explain the course of the case, as far as it went. The case began in 1807.

"SELKIRK, 5th August 1807.—The Sheriff having considered this Minute, Answers, and Whole Cause, Appoints the pursuer before Answer to lodge a Condescendence stating 1st what was the period fixed on for delivery of the lambs and particularly whether the whole number were ready to be delivered on or before St. Boswell's fair, 2dly, whether he undertakes to prove that the price fixed at St. Boswell's fair as mentioned in the Minute applied as well to the eighty-four lambs not delivered as to the larger number already lifted by the Defender. 3dly. What was the difference between the Boswell and Lambmas prices for lambs of the description of those last lifted.

"(Sgd.) WALTER SCOTT."

"SELKIRK, 23rd March 1808.—The Sheriff-Depute having advised with the Sheriff-Substitute, Allows the pursuer a proof of the terms of his bargain and the Defender a conjunct probation as accords.

"(Sgd.) CHAS. ERSKINE."

"SELKIRK, 8th August 1810.—The Sheriff having advised the proof and whole cause finds that the specific nature of the bargain has not been established by either party, But finds that the pursuer disposed of another number of lambs of the same quality

with those sold to the Defender and at the same time at ten shillings per head; therefore finds the Defender is liable for those sold to him at the same rate and Decerns, But finds expenses due to neither party.

“(Signed) WALTER SCOTT.”

The defender appealed by reclaiming petition, and the Sheriff pronounced the following interlocutor:—

“SELKIRK, 7th August 1811.—The Sheriff-Depute having advised this petition with Answers Refuses the prayer thereof and adheres to the Interlocutors reclaimed against. Conjoins the counter action at Mr. Hume’s instance with the present process finds the reference to oath upon the disputed articles as stated in Mr. Hume’s Answers competent and ordains Mr. Arras to appear and depone in terms of the said reference before answers and that upon the day of .

“(Signed) WALTER SCOTT.”

The case must have been settled. There are no further proceedings.

45.

1811.—*Master and Servant : Wages.*

JOHN RUTHERFORD, labourer, Oakwoodmill, *against* GEORGE PARK, tenant in Carterhaugh.

An action for payment of wages. The case did not proceed to final judgment; but the following interlocutor was issued:—

“SELKIRK, 7th August 1811.—The Sheriff having considered this process, in respect that it is admitted that the pursuer was engaged to work a pair of horses and actually did work them both before and during the time of harvest, finds that it is incumbent upon him to prove what is set forth on the second page of the Answers respecting his master having agreed to give him reaper’s wages and allows him a proof of the said fact either by oath of party or by recovery of the book mentioned in the same page or by any other mode of proof.

“(Sgd.) WALTER SCOTT.”

46.

1811.—*Sale: Breach of Warranty.*

JAMES YULE, merchant in Kelso, *against* JAMES INGLIS, shoemaker in Selkirk.

The defender sold to the pursuer the carcasses of two swine, which he alleged to be "clean pork," but which, on being cut up, turned out to be stale; further, one was discovered to be a boar seig.¹ Pursuer claimed damages. The following interlocutor was pronounced:—

"SELKIRK, 28th August 1811.—The Sheriff-Depute allows the Pursuer a proof of the fact that the Defender warranted expressly the pork sold to him as clean pork; and allows the Defender a counter probation, and also a proof that the pork was killed within due time before the sale and that it was sold under market price.

"(Signed) WALTER SCOTT."

At this stage the case was probably settled, as there are no further judicial proceedings.

47.

1810.—*Breach of Peace: Damage for Destruction of Property.*

ROBERT BROWN, weaver in Galashiels, with concurrence of the Procurator-Fiscal, *against* JAMES HAIG, weaver in Galashiels.

Action for value of table, etc., alleged to have been destroyed by defender, combined with criminal charge against him of riot and breach of the peace.

The circumstances and the judgment are set forth at p. 48.

48.

1811.—*Master and Servant: Wages: Desertion of Service.*

ALEXANDER M'KENZIE, "plaisterer" in Gattonside, *against* JOHN HALL, "plaisterer" in Selkirk.

An action for payment of wages, with a counter-action for damages for desertion of service.

The circumstances and facts are set forth at p. 59.

¹ Or segg. Cp. passage in *The Monastery*, i. 140—"An' what made you, ye misleard loons," said Dame Elspeth to her two boys, "come yon gate into the ha', roaring like bullssegs, to frighten the ledly?"

49.

1811.—*Succession : Executor : Accounting.*

AGNES DICKSON, Selkirk, "widow to the deceased CHARLES HISLOP there," and others, *against* GEORGE RODGER, writer in Selkirk.

This was an action of accounting in the executry estate of Charles Hislop, Selkirk, and for delivery of the deeds, rights, and securities of the estate, heritable and movable. It was disposed of by the Sheriff by the following interlocutor, written by him:—

"SELKIRK, 7th August 1811.—The Sheriff-Depute having advised this process finds that in accounting with the pursuers Mr. Rodger must debit himself with the interest upon Baillie William Rodger's Bill for One hundred pounds down to the term proceeding the Baillie's death, Finds him entitled to credit for his Account of Business and remits to the Sheriff-Substitute to fill up the articles left blank, to strike a balance on the Account and Decern therefore.
" (Signed) WALTER SCOTT."

Note.—"The Sheriff thinks it necessary to mention that the sole ground of this decision is the ground of law which renders an Agent liable in strict diligence in the affairs entrusted to him and there is no occasion for pleading it as a question of character."

The defender reclaimed, and the Sheriff issued the following interlocutor:—

"SELKIRK, 6th November 1811.—The Sheriff-Depute having advised this Petition and Answers, adheres to the Interlocutor reclaimed against, finds the proposed reference to oath of party incompetent and refuses the prayer of the Petition.

" (Signed) WALTER SCOTT."

50.

1811.—*Succession : Executor : Exhibition of Titles.*

WILLIAM WHITE, Buccleugh Street, Edinburgh, "nephew and heir-apparent" of the deceased Reverend Doctor William Dalgleish, minister of Peebles, petitioner.

A petition against executors to exhibit titles.

The Sheriff pronounced this judgment, written by his own hand:—

"SELKIRK, 16th September 1811.—The Sheriff-Depute declines to judge in the present case on the ground of incompetency,

reserving to the petitioner to bring his action of exhibition *ad deliberandum*¹ in a regular manner and competent Court; Finds the petitioner liable in expenses, modifies the same to twenty shillings, and Decerns therefor.

“(Signed) WALTER SCOTT.”

51.

1812.—*Boundary: Cost of March Dyke.*

ARCHIBALD DUNLOP, Esquire, of Whitmuir, *against* THE MAGISTRATES OF SELKIRK.

This was an action against the Town Council to have them ordained to concur in erecting a march dyke at the South Common. The magistrates agreed to this, but claimed an increased rent from the pursuer, he being tenant under them of said lands of South Common.

The facts and differences, so far as material, appear from the following interlocutor, which is written on counter-libel No. 2 by Sir Walter Scott:—

“SELKIRK, 8th January 1812.—The Sheriff-Depute having considered the original proof with the two counter actions, and defences, answers, etc. Conjoins the same and in the original action Decerns in terms of the libell and finds the Defenders liable jointly with the pursuer in building the March dyke in question. Finds in the counter action No. 2 that Mr. Dunlop is bound to bring forward a Cautioneer in terms of his obligation and Decerns accordingly but Assoilzies him from the claim of penalty.

“Finds in the counter action No. 7 that Mr. Dunlop having as tenant of the town lands the same benefits which any other tenant would have derived from the March dyke in question is, in terms of his obligation liable in payment of Six per centum of additional rent upon the sums which shall be expended in building the same, and Decerns and Declares accordingly. Finds the Magistrates of Selkirk liable in the expense of the original summons and Mr. Dunlop liable in the expenses incurred in the two counter actions, and allows an account to be given in.

“(Signed) WALTER SCOTT.”

¹ This is an action which an apparent heir might bring to have the titles exhibited in order that he might determine whether he should accept the succession.

52.

1812.—*Process : Proof : Reference to Oath : Signature of Party.*

JOHN SCOTT, merchant in Buckholmside, *against* ROBERT JERDAN and JOHN JERDAN, tenants in Laidlawstiel.

This was an action for payment of a merchant's account, for goods supplied to Robert Jerdan and Mrs. Jerdan down to 1809, £4, 6s. 10d., and to John Jerdan down to 1807, 19s. 6d. Robert consigned 19s. 2d., which he admitted to be due for goods supplied to his servant Margaret Haldane. *Quoad ultra* the defenders pled prescription—that is to say, that the claim came under the Act 1519, cap. 83, by which is enacted that “all actions of debt for . . . merchant's compts . . . that are not founded upon written obligations, be pursued within three years, otherwise the creditor shall have no action, except he either prove by writ or by oath of his party.” Robert averred that Mrs. Jerdan had got from pursuer a discharge of the account, but that it had been lost or laid aside. He stated that he was ready to depone on oath that it was long ago paid.

The following interlocutor, with note, was pronounced, sustaining this plea:—

“SELKIRK, 25th April 1812.—The Sheriff-Depute having advised the summons, defences and whole process, finds the reference to oath competent; Appoints the same to be subscribed by the pursuer with his own hand, and, upon his doing so, Appoints the Defenders, Robert and John Jerdan and also Mrs. Jerdan to appear and depone under certification,¹ the next Court day after such signed reference shall be intimated to them.

“(Signed) WALTER SCOTT.”

Note.—“The Sheriff begs to call the attention of the pro^r² in his Court to doubts which have been entertained how far the signature of a pro^r can bind his client in a reference to oath. The practice which has crept in appears at least loose and doubtful, and therefore, the Sheriff will not in future sustain any reference unless the same is subscribed by the party as well as his agent.

“(Initialed) W. S.”

The action must have been abandoned at this stage. There are no

¹ *I.e.* here, the *assurance* that decree will be given against them.

² Solicitors.

further proceedings, beyond this interlocutor by the Sheriff-Substitute:—
 “24th June 1912.—In respect Mr. Jerdan is unable to come from home remits to John Dalzell, Writer, in Earlston to take his oath and report.”

53.

1812.—*Lease: Hypothec: Diligence of Creditor of Tenant.*

JOHN CORSE SCOTT, Esquire, of Sintoun, *against* WILLIAM, JOHN, JAMES, and ANDREW TURNBULL.

This was an action at the instance of the landlord against the tenants for arrears of rent, etc., and complaining that subjects liable to the pursuer's hypothec were in danger in respect that the effects were pointed and in danger of being abstracted and carried off under letters of horning by the British Linen Bank.

The first interlocutor (written by Sir Walter Scott) was as follows:—

“SELKIRK, 28th August 1810.—The Sheriff having heard this petition recalls in *hoc statu* the Warrant for sale of the pointed effects and prohibits and discharges the said Ebenezer Gilchrist from carrying off the same until the right of the petitioner be either satisfied or discussed and grants similar interdict against all persons whatsoever and grants Warrant in common form to the Clerk and Officers of Court to pass to the farms of Parkhead and Langtoun and there to inventory and sequestrate the whole crop, stocking, household furniture implements of agriculture and other effects whatsoever found upon the farms aforesaid. But before Answer as to the prayer for authorising the Sale thereof appoints this petition to be intimated to the within named William, John, James, and Andrew Turnbull and also to Messrs. Rodger and Paterson, Agents for the said Ebenezer Gilchrist and Allows them or any of them to see and Answer the same, the Answers to be lodged with the Clerk of Court on or before Saturday first, under certification.

“(Signed) WALTER SCOTT.”

The tenants presented a petition to recall the warrant of sale of the pointed effects granted at the instance of Mr. Ebenezer Gilchrist, but to prohibit the carrying off of the petitioner's effects. On this the Sheriff pronounced this interlocutor:—

“SELKIRK, 21st September 1810.—The Sheriff conjoins the

present application with those at the instance of Mr. Corse Scott and Mr. Ebenezer Gilchrist, and Appoints the said Ebenezer Gilchrist to see and Answer the same and that within three days from the date hereof, under certification.

“(Signed) WALTER SCOTT.”

Answers were lodged; and this interlocutor followed:—

“SELKIRK, 13th October 1810.—The Sheriff having resumed consideration of the Petition with Answers and whole cause Conjoins the same with the application at the instance of John, James, and Alexander Turnbells and Finds 1st That the Landlord Mr. Scott's claim of hypothec over the stock and crop extended to the sum of five hundred pounds being the current year's rent and that the hay ricks and pease-stacks stated to be part of crop Eighteen hundred and nine are further hypothecated for the arrear of Seventy one pounds nineteen and eightpence, and decerns. 2^{dly} Finds that the poiding creditor may be allowed to proceed with his diligence upon his satisfying the Landlords claims in the same manner to which the Tenants were bound namely paying such part of the rent as is instantly due and by granting security for payment of that moiety falling due at next term. 3rd. Upon the application of the Messrs. Turnbells the Sheriff finds that diligence used against the stock of a farm possessed by the brothers *pro indiviso* upon a debt which *ex facie* appears to be due only by one of their number can only affect the individual interest of the debtor and therefore the effect of Mr. Gilchrist's poiding must be regulated by the issue of the Count and Reckoning among the brothers. Lastly in case the poiding creditor shall not in these circumstances chose to avail himself of the option given him to relieve the stock and crop of the Landlord's claim the Sheriff will grant warrant of Sale for payment of the rent and for securing the balance for behoof of all concerned.

“(Signed) WALTER SCOTT.”

Mr. Gilchrist thereupon presented a petition to have the matter of the debt referred to the oath of the tenants, and for a warrant instantly to sell. The following interlocutor (in Sir Walter's handwriting) was pronounced:—

“SELKIRK, 23rd January 1811.—The Sheriff-Substitute having advised with the Sheriff-Depute Finds the reference, to oath pro-

posed in the petition competent upon the two following heads: 1st. That the debt of Mr. Gilchrist is a proper debt of the four Brothers or 2dly That William Turnbull contracted the debt by a delegated authority from the other three brothers and that the proceeds being applied to the farm of which they were joint tenants was *in rem versum* of all the four, and appoints the saids John, James and Andrew Turnbells to appear and depone in Court upon these two points and that on the . . . under certification, and in the Interim grants warrant of sale of the Sequestrated effects in common form for payment of the rent and for securing the balance of the price for behoof of all concerned such Sale being always under burden of the clause appointing the fodder to be consumed upon the farm.

“(Signed) CHAS. ERSKINE.”

By minute the pursuer asked that the sum due to him out of the sale of the sequestrated effects be paid over to him; and this crave was granted by the following interlocutor:—

“SELKIRK, 25th April 1812.—The Sheriff-Depute having considered the above minute and no objections being made grants Warrant to and Ordains the clerk of Court to make payment to John Corse Scott, Esq., of the sum of Four hundred and fifty six pounds ten shilling 11/½ with the expenses of process when the same should be modified.

“(Signed) WALTER SCOTT.”

54.

1812.—*Fiars Court : Order.*

PETITION BY JOHN C. SCOTT AND OTHERS, praying that a Court may in future be held in the county of Selkirk for striking the fiars prices. The narrative of the petition and the order of Court following on the prayer are set forth at p. 63.

55.

1812.—*Sale : Price : Evidence : Admissibility of Witness : Cum Nota.*

ANDREW HUNTER, Nether Barns, *against* JOHN FERGRIEVE AND OTHERS, Galashiels.

This was an action for balance due for price of corn.

The first interlocutor was as follows:—

"SELKIRK, 28th August 1811.—The Sheriff-Depute allows the pursuer a proof of the facts and circumstances by which he means to establish the terms of the bargain reserving to the Court to judge of the admissibility of such witnesses as shall be therein brought forward and allows the Defenders a counter probation as accords.

"(Signed) WALTER SCOTT."

George Erskine, a witness tendered by pursuer, was objected to on the ground that he was a brother-in-law of the pursuer. Sir Walter repelled the objection by this interlocutor:—

"SELKIRK, 8th January 1812.—The Sheriff-Depute repels the objection stated to George Erskine's evidence and appoints him to be examined *cum nota*.¹

"(Signed) WALTER SCOTT."

After proof, the following interlocutor, in Sir Walter's handwriting, was pronounced:—

"SELKIRK, 24th June 1812.—The Sheriff-Substitute having advised with the Sheriff-Depute and having considered the proof adduced and whole cause, Decerns against the Defenders in terms of the libel and finds expenses due.

"(Signed) CHARLES ERSKINE."

56.

1812.—*Sale : Wool : Evidence.*

ALEXANDER DOBSON, skinner in Selkirk, *against* THOMAS COOK and JAMES HAIG, Junior, clothiers in Galashiels.

An action for the price of wool sold to the defenders.

The action was decided by the following interlocutor, in Sir Walter Scott's handwriting:—

"SELKIRK, 28th February 1812.—The Sheriff-Substitute having

¹ *I.e.* with a mark or reservation. By our former practice, followed at the time of this interlocutor, certain disqualifications attached to witnesses on the ground of their relationship to one of the parties, or their being his agents, etc. When a person was tendered as witness, to whom such an objection in some measure applied, it was customary to admit him (especially in cases where there was *penuria testium*) *cum nota*, with a mark to call the attention of the judge to the partial application of the disqualification, and with a reservation to him to determine the weight to be given to his evidence in the circumstances. Practically, however, no difference was made between this testimony and that of any other witness.

advised with the Sheriff-Depute, finds that the circumstances of the case afford tolerable evidence that the Bill granted for twelve pounds was meant to close the transactions between the parties, Therefore directs the sum consigned to be delivered up by the Clerk of Court to the pursuer. Assolzieis from the conclusions of the libel *quoad ultra*, and finds no expenses due to either party.

“(Signed) CHAS. ERSKINE.”

The pursuer appealed by reclaiming petition. This was disposed of by an interlocutor and note, both in Sir Walter's handwriting, thus:—

“SELKIRK, 24th June 1812.—The Sheriff-Substitute having advised with the Sheriff-Depute, Refuses the prayer of this petition, and adheres to the Interlocutor reclaimed against.

“(Signed) CHAS. ERSKINE.”

Note.—“In explanation of the epithet *tolerable*, used in the Interlocutor reclaimed against, it need only be observed that parties in the present and in similar cases very often conduct a number of petty and complicated transactions in so confused a manner that a judge has not the full evidence for explicating them which he might desire, and therefore must be contented with the best that the case affords.

“(Initialed) W. S.”

57.

1812.—*Road : Toll : Temporary Toll-Bar.*

THOMAS GOVINLOCK, tacksman of Selkirk Toll-Bar, *against* GEORGE PARK, farmer, Carterhaugh.

An action for 3d. of toll duty and 40s. of statutory penalty for passing a temporary toll-bar without payment, on the day of St. Boswells Fair, 1811.

The facts and the judgments are set forth at p. 43.

58.

1812.—*Road : Toll : Temporary Toll-Bar.*

THOMAS GOVINLOCK, tacksman of Selkirk Toll-Bar, *against* MR. ALEXANDER LAIDLAW, son of Mr. Robert Laidlaw, farmer at Philiphaugh.

An action for same amount of toll duty and penalty and similar in its circumstances to the immediately preceding action.

The facts and judgment are set forth at p. 43.

59.

1812.—*Master and Servant : Wrongous Dismissal.*

THOMAS DRYDON, late servant to Thomas Arras, tenant in Megal Pots, *against* the said THOMAS ARRAS.

An action for wrongful dismissal.

The circumstances and judgment are set forth at p. 50.

60.

1812.—*Bill of Exchange : Irregularity.*

GEORGE MARK, tenant in Mossilee, *against* EBENEZER KNOX, tenant in Crosslee.

A petition regarding a disputed bill transaction.

The circumstances and judgment are set forth at p. 65.

61.

1812.—*Building Contract : Threshing Mill : Defective Construction.*

ALEXANDER HOPE and THOMAS WILLIAMSON, masons in Selkirk, *against* JOHN HEITON, wright at Philiphaugh; and GEORGE PARK, tenant in Carterhaugh, *against* JOHN HEITON, wright at Philiphaugh.

Actions for damages in respect of defective construction of a threshing mill erected by defender.

After a remit to persons of skill to inspect and report on the construction of the mill, the following interlocutor (in Scott's handwriting) was issued:—

“SELKIRK, 26th February 1812.—The Sheriff-Substitute having advised with the Sheriff-Depute, and having considered the Report lodged, Before Answer Appoints Mr. Park to state whether the walls of the premises are made of the thickness covenanted between him and Mr. Heiton, also Appoints Mr. Heiton to state, in a Minute, whether the said walls are executed to the thickness contracted upon between him and Messrs. Hope & Williamson; Further Appoints Messrs. Hope & Williamson to proceed with the repairs recommended in the Report, under certification that the expenses will be allowed them if they should be proved to have discharged their duty in the original contract; Allows them also to see and

Answer the Minutes appointed to be lodged by Messrs. Park and Heiton if they shall see cause to do so.

“(Signed) CHAS. ERSKINE.”

The following interlocutor was issued:—

“SELKIRK, 22nd July 1812.—The Sheriff-Depute having advised the Mutual Minutes, Answers, Report of Tradesmen, and whole cause Finds that the Walls of the Threshing Mill are insufficient by being three inches thinner than is usual or fitting for such a purpose. Finds it is not pretended by either of the contracting parties that this departure from the usual mode of building was adopted by instructions from Mr. Park, but on the contrary that the model agreed on was the Threshing Mill at Howden which is stated to be three inches thicker in the walls than that at Carterhaugh. Therefore finds John Heiton, Wright, and Alexander Hope and Thomas Williamson, Masons, liable conly and sevlly¹ in damages to Mr. Park, Modifies the same to the sum of Ten pounds and Decerns, further appoints them conly and sevlly¹ to perform the various repairs pointed out by the report of Messrs. Paterson and Dobson and such others as may be necessary to put the Mill in a good and sufficient condition under certification that if this is not begun within ten days from the publication hereof Mr. Park shall be at liberty to execute these repairs, having recourse against the said parties for the amount thereof. Lastly in order that it may appear who is to be ultimately liable in the damages and expenses decerned for the Sheriff finds the reference to Heiton's oath made by Hope and Williamson is competent and ordains him to appear and depone to all pertinent interrogatories touching the contract which he made with the masons for building the Mill and particularly as to the dimensions of the Walls. Finds Heiton liable to Mr. Park in expenses reserving his recourse against Hope and Williamson if he shall be found to have any.

“(Signed) WALTER SCOTT.”

62.

1812.—*Church : Manse : Right to Designate Site.*

THE REVEREND CHARLES PATON, minister of Ettrick, *against* THE HERITORS OF THE PARISH.

A petition for interdict against the building of the new manse on

¹ Conjunctly and severally.

the site chosen by the heritors; for an order on them to erect it on a spot pointed out by the petitioner; and for payment of £50 for damages sustained through his glebe being injured.

The circumstances and judgment are fully set forth at p. 31.

63.

1813.—*Boundary; Building of March Dyke: Deviation by Mason.*

THE MAGISTRATES AND TOWN COUNCIL OF SELKIRK *against* JAMES HISLOP, residenter in Selkirk.

The defender was instructed by the magistrates of Selkirk, as owners of the South Common, and by Mr. Dunlop as owner of the Whitmuir estate, to build a march dyke between these properties. The expense of the dyke, it was agreed, was to be borne equally by the magistrates and Mr. Dunlop.

In this action the pursuers alleged that the defender did not build the dyke on the line pointed out to him, but encroached on the town's lands; and they prayed for an order on the defender to remove the dyke and to rebuild it at his own expense upon the correct march between the two properties.

The defender in his answers stated that he had commenced digging "pitts exactly in the line which he conceived to be the March between the Town's lands and that of Whitmuir," when he was visited by Mr. Dunlop, who told him he was making encroachments on his lands, and with stones and other methods pointed out the very line of march where the dyke is now built . . . and accordingly made the Respondent commence his operations on the line pointed out."

Mr. Dunlop denied that he ever gave the contractor orders to deviate from the march line or that he told him he was encroaching on his lands.

The following interlocutor, in Sir Walter Scott's handwriting, was issued:—

"SELKIRK, 6th January 1813.—The Sheriff-Depute having considered this process In respect the Contractor has taken it upon him in building the march fence in question willfully to depart from the line of march pointed out to him and which is admitted on all hands to be the true line, Ordains him to pull down the said March fence and rebuild the same at his own expense upon the original line and Decerns, Reserving to him competent recourse against Mr. Dunlop if he can prove he acted by his direc-

tions and further ordains the alteration to be made by pulling down and rebuilding a few roods at once, and finds Hislop liable in expenses.

“(Signed) WALTER SCOTT.”

64.

1813.—*Unauthorised Custody of Property : Liability for Loss.*

WILLIAM LAING, in Sinton Mains, *against* JOHN SMITH, carter in Selkirk.

An action for the value of a cart and harness belonging to the pursuer and removed by the defender from the custody of an innkeeper in Edinburgh.

The circumstances and judgment are set forth at p. 75.

65.

1813.—*Tweed Fisheries Act : Contravention : Illegal Possession of Salmon.*

RIVER TWEED COMMISSIONERS *against* ALISON JAMIESON, residing in Selkirk.

Complaint charging the defender with having one or more salmon in her possession, contrary to the provisions of the Act.

The following was the judgment (in Scott's handwriting):—

“SELKIRK, 10th March 1813.—The Sheriff-Substitute having advised with the Sheriff-Depute, Finds the defender liable in the statutory penalty of five pounds and in expenses, and Decerns.

“(Signed) CHAS. ERSKINE.”

66.

1813.—*Tweed Fisheries Act : Contravention ; Fishing in Close Time ; Illegal Possession.*

GEORGE RODGER, Procurator-Fiscal of Court for the public interest, *against* MICHAEL ANDERSON, Esquire, of Tushielaw.

A charge against Mr. Anderson of having contravened the Tweed Fisheries Act, 47 Geo. III. cap. 29.

The summons first served (December 1810), which of course ran in the name of “Walter Scott, Esquire, Advocate, Sheriff-Depute of Selkirkshire and my Substitute,” was in these terms:—

“Whereas it is humbly meant and shown to us by George Rodger, Writer in Selkirk Procurator Fiscal of Court for the Public Interest, That by an Act of Parliament of the Forty-seventh year of his present majesty Chap. 29—Entitled, an Act to amend and

render more effectual three Acts made in the Eleventh, Fifteenth and Thirty-seventh years of his present Majesty for the regulation and improvement of the Fisheries of the River Tweed, It is enacted and Statuted and ordained that from and after the passing of this Act it shall not be lawful for any person or persons to fish for any Salmon, Gilse, Salmon Trout, Bull Trout or Whitling or any Fish denominated Red Fish in any ancient Grants of fishing in the said River Tweed, or in any River, Rivulet, Brook or Stream, or in any Mill Pool, Mill Lead Sluice or Cut, which communicates with the said River Tweed, or within the mouth or Entrance of the said River Tweed, at any time or times between the Tenth day of October in any year, and the Tenth day of January in the year following, or between Ten of the clock on Saturday night and Two of the clock on Monday morning, nor shall it be lawful at any time or times after the passing of this Act for any person or persons excepting as therein after excepted to fish for any salmon, Gilse, Salmon Trout, Bull Trout or Whitling or Red Fish within the mouth or Entrance of the said River Tweed; and in case any person or persons shall fish contrary to the prohibitions aforesaid every such person or persons so offending shall for every such offence forfeit and pay any sum not exceeding Thirty pounds nor less than ten pounds at the discretion of the Justice or Justices of the Peace or Sheriff-Depute before whom such offender or offenders shall be convicted, and the sum of Ten shillings for every Salmon, Gilse, Salmon Trout, Bull Trout, Whitling or Redfish so taken. Together with the fish so taken and the Boats, Tackle, Nets, Engines and other Devices made use of in fishing for any such Fish and the said Justice or Justices or Sheriff-Depute shall order and direct such Boats, Tackle, Nets, Engines and other devices to be cut in pieces, burnt or otherwise destroyed; Notwithstanding whereof true it is and of verity that Michael Anderson, Esquire, in Tushielaw, has been guilty of contravening the foresaid Act of Parliament in so far as upon Friday the Twenty third day of November last, or upon other of the days of that month the said Michael Anderson, Esquire, was guilty of fishing for and killing fish in the rivulet called Rankle Burn running into the River Ettrick; whereby it is manifest that he has been guilty of a most unwarrantable and illegal Act, and in perfect contempt of the before-recited Act of Parliament, and other Acts therein mentioned:

Minor
Premise.

Conclusion.

"Therefore the said Michael Anderson, Esquire, Defender ought and should be decerned and ordained by our Decreet to make payment to the Complainer of a sum not exceeding Thirty pounds nor less than Ten pounds as a fine incurred by him in contravening the foresaid Act of Parliament in manner aforesaid, To be applied as therein directed; Besides ordaining the Boats, Tackle, Nets, Engines, and other devices so illegally used by him to be cut in pieces, burnt or otherwise destroyed as a terror to others not to commit the like offence in time coming as also in the expenses of this process and Decreet thereon to follow.¹

"Therefore we command and charge you that ye pass and in His Majesty's name and authority and ours lawfully Summon Warn and Charge the said Defender personally or at his dwellingplace upon six days warning, to compear before us within the Council House of Selkirk upon Wednesday the day of in the hour of Cause with continuation of days to answer at the instance of the said Pursuer in the matter libelled, That is to say to hear and see the premises verified and proven and Decreet and Sentence given forth and pronounced therein *ut supra*, or else to alledge a reasonable cause on the Contrary with Certification as effeirs According to Justice. Given under the hands of the Clerk of Court of Selkirk, 3rd December 1810.

"(Signed) ANDREW LAING, Clerk."

Mr. Anderson lodged defences to this first summons. After reciting at length the charge made against him, he goes on:—

"The Defender before he proceeds farther, in defence against the Action; denies most pointedly the whole Libel as narrated in the Summons, leaving the pursuer to establish the facts by proof: And at the same time, he cannot help expressing his regret and his sorrow that his name should have made its appearance in a Court of Justice as having violated and infringed upon the Laws of his country, more especially those laws, which he has all along been so anxious to respect; he is also aware that no man within the four corners of this realm has a more perfect reverence for the protection of the Fishing laws in particular as he has on many occasions brought to punishment persons wantonly and improperly

¹ The indictment, it will be seen, is stated in the form of a syllogism, in accordance with Scottish criminal practice down to 1887.

violating those Laws. It is almost unnecessary here to mention that the defender's indefatigable zeal and exertions in promoting the interest of the fishing Acts, and in protecting the Game of every description, and bringing to punishment transgressors of those laws in his district of country during the periods forbidden by Act of Parliament is well known to the community at large he is therefore convinced that his name has been very improperly made use of in the present instance, which must have been attempted by some one who has felt the effects of his unremitted exertions in bringing to punishment poachers of every description.

"Having stated these particulars the defender shall conclude with this short defence, vizt. he denies most pointedly that he ever '*fished for, or killed fish* in the rivulet called Rankle burn running into the River Ettrick' as narrated in the Summons. This being the case therefore the defender feels confident your Lordship will at once assoilzie him from the present groundless Action and find him entitled to his full expenses. Under protestation to Add and Eik.

"(Signed) ROBERT HENDERSON."

At this stage (18th March 1811) the procurator-fiscal served his second summons. It recites the second section of the Act, and thus alters the charge. In other respects it is identical with the first summons, but the minor premise is in these terms:—

"Notwithstanding whereof, true it is and of verity, that Michael Anderson, Esquire, in Tushielaw has been guilty of contraveining the foresaid Act of Parliament, In so far as upon Friday the Twenty-third day of November last, or upon one or other of the days of that month or of the month of October preceding, or of the months of December and January following the said Michael Anderson, Esquire, was guilty not only of fishing for and killing fish in the Rivulet called Rankle burn running into the River Ettrick, and in the said River Ettrick, and other Rivers and Streams, which communicate with the said River Tweed, and in the said River Tweed itself; But also of buying or selling, or having in his custody or possession Salmon Gilses, Salmon Trouts, Bull Trouts, or Whitlings, knowing the same to have been killed or taken in the said River Tweed, or in any River, Rivulet, Brook or Stream or in any Mill Pool, Mill Lead Sluice or Cut, which communicates with the said River Tweed between The Tenth day of

October Eighteen hundred and ten and the tenth day of January last, or between Ten of the clock on Saturday night and Two of the clock on Monday morning, whereby it is manifest that the said Michael Anderson, Esqr. has been guilty of a most unwarrantable and illegal Act, and in perfect contempt" of the Statute.

Thinking himself to be confronted with two summonses at one and the same time, the defender lodged a minute in which he complained of a second action having been raised without the first having been withdrawn, and craved the Sheriff to ordain the second action to be withdrawn. The procurator-fiscal lodged answers to this minute in which he stated that:—

"*At the time the second libel against Mr. Anderson was called in Court the Respondent distinctly mentioned to his Procurator that he withdrew the first Action and the reasons that induced him to raise the Second which were no other than that the first libel was imperfect and not so full as the Respondent intended it to have been, in as much as it did not recite the Second Section of the Act of Parliament libelled on prohibiting persons from having any Fish of the descriptions mentioned in their possession or selling or buying the same during Closes-time.*

"As the respondent wished to supply this defect in order fully to convict the Defender, there can be no doubt that he had it perfectly in his power to do so and to *withdraw the first libel, which he accordingly did at the time the second libel was called in court*, and he therefore craves that your Lordship will appoint the Defender instantly to state peremptory¹ defences against the *second libel* and to find him liable in the whole expenses incurred."

The Sheriff pronounced the following interlocutor with regard to the *first* summons:—

"SELKIRK, 28th August 1811.—The Sheriff-Depute having considered this process, now deserted by the Procurator-Fiscal, Assolizies the Defender from the conclusions, therefore finds the pursuer liable in expenses, and Decerns.

"(Signed) WALTER SCOTT."

With regard to the *second* summons, he on the same day issued this interlocutor:—

¹ *I.e.* defences on the merits, as distinguished from dilatory or preliminary.

“SELKIRK, 28th August 1811.—The Sheriff-Depute having considered this Summons finds the same competent as resting upon another clause of the Tweed Act than is founded upon in the libell against the same Defender from which he is of this date assoilzied with expenses. Therefore ordains Mr. Anderson to lodge peremptory defences *in causa* against next Court day.

“(Signed) WALTER SCOTT.”

Mr. Anderson accordingly lodged defences, which are in terms practically identical with those he lodged to the original summons, with a general denial applying to the new count in the charge.

The procurator-fiscal lodged answers.

“The Respondent¹ assures your Lordship that it was with extreme regret he in discharge of his duty intended the present Action, and from the information lodged with him he expected the Defender would have made a very different defence against the Action than what he has now offered which lays him under the disagreeable necessity of using the means to bring the complaint home to the Defender by a proof, which, if the information he has received is correct, he will be under no difficulty to do.

“Without detracting from the praise which the Defender has very liberally bestowed on himself for his pretended exertions in enforcing the observance of the Act of Parliament libelled on and in detecting and bringing to punishment the offenders against that Act and the Game Acts or what he calls propogating (*sic*) the intention of the Act founded on, his exertions in these respects have hitherto been of a negative nature, for the Respt. does not remember of a single offender having ever been either brought before your Lordship or convicted of contraveining the Acts of Parliament referred to by the Defr. thro’ information given by him. It is obvious that if the Defender has contraveined the Statute libelled on the bad example shown by a person in his station in life will have but too great a tendency to encourage the lower orders of society to set at defiance this Enactment of the Legislature the breach of which they are but too apt to consider as no crime. And it is conceived that if the Respt. shall be successfull in proving that the Defender has been guilty of the offence complained of, his former

¹ The procurator-fiscal continues to describe himself as “Respondent.” This was correct in the Minute stage of the proceedings, but is misleading here.

exertions to enforce the observance of the Act libelled on, or his vigilance (*sic*) to detect persons who may have been guilty of contravening the same, will never justify his own guilt or screen him from the penal consequences of the act. The Defender at the top of page 5 of his Defences has made a feeble attempt to explain away the Statement made in the Libel by pretending that he never fished for or killed fish in the rivulet called Rankleburn and running into the Ettrick, nor had in his possession or sold or bought any of the species of Fish specified in the libel knowing the same to have been killed or taken in the river *Tweed* and that if such has ever been in his custody or possession it was brought there without his knowledge. The Respt. has only to observe that both the Act of Parliament and the Libel comprehends "Fish taken in any river, rivulet, Brook or Stream, etc., *which communicates with the river Tweed*, and that if the Defender shall be convicted of having fished for or killed fish in any River, Rivulet, Brook or Stream, etc., which communicates with the said River Tweed, or having the same in his custody or possession it is clear and he is equally guilty and will fall to be convicted by your Lordship if the fish so killed by him or had in his custody or possession were taken in any River, Rivulet, Brook or Stream, etc., which communicates with the said River Tweed as if they had been killed in the said River Tweed itself; and it is not to be believed that the fish were brought into 'his custody or possession' without *his knowledge and consent*. Before concluding the Respt. cannot help observing that some one circumstance or other must certainly have occurred to give rise to the present subject and from the information lodged with him he expected that the Defender would in his defences have at least mentioned some such circumstance, for however anxious he may have been not only not to offend himself, but to prevent others from so doing, and bringing to punishment such as may offend, yet the most cautious, and even he, may upon some occasion or other have been so far off his guard, as to contravene the Act libelled on."

The Sheriff then issued this interlocutor:—

"SELKIRK, 25th April 1812.—The Sheriff-Depute Allows the public procurator a proof of his libel and the Defender a counter probation as Accords.

"(Signed) WALTER SCOTT."

The procurator-fiscal's proof was led on 8th July 1812. The note of evidence is in these terms:—

“Compeared¹ James Frier, Mason in Selkirk, married, aged fifty and upwards, who being solemnly sworn and interrogated purged of partial counsel and malice Depones that in the month of November Eighteen hundred and ten, he in the way of his duty as Surveyor of the Highways in the County of Selkirk went to Tushielaw to meet with Mr. Anderson the Defender to accompany that gentleman from thence to some roads that were making up Rankleburn. The Party consisting of Mr. Anderson his servant, and the Deponent, left Tushielaw and proceeded to Rankleburn when about two miles above Buccleuch, where the burn is very small, the Party were obliged to ride up the middle of the runner for a space as the Depont. describes it of about the breadth of Selkirk street. Mr. Anderson was first, the Deponent was next, and Mr. Anderson's servant came last. When in the Burn, a fish, either a large Trout or of some other species taking the alarm, and being disturbed by Mr. Anderson's horse made a sudden run, and actually forced itself out of the Burn on the dry rocks. Mr. Anderson past on, and the Deponent coming next with a stick in his hand bowed himself forward and with his stick killed the fish but did not then take it up having left it on the rock. The Party proceeded about two miles farther on, and then returned, after having seen the road. On their way back, when they came to the place where the fish was left, the Deponent came off his horse, took up the fish, which he suspended by the Gills not wishing to file his pocket with it, and in that state he carried it home to Tushielaw, and gave it to a boy at the stables, without giving him any particular directions relative to the disposal of it, but whether the boy was a hired servant of Mr. Anderson's or not, the Deponent does not know, but the Deponent has seen that boy about Mr. Anderson's stables both before that day and after it. Depones that he dined that day at Mr. Anderson's house at Tushielaw, and being specially interrogated if he saw any fish at Mr. Anderson's table, or in Mr. Anderson's house that day, Depones that he that day eat some salt sea-fish, but he does not recollect of seeing in Mr. Anderson's house, or that day eating there any

¹ Appeared.

fresh water fish. Being specially interrogated if he knows what became of the fish that he gave to the boy at Tushielaw stable, Depones that the Deponent being neither Steward nor Cook to Mr. Anderson gave himself no trouble about the fish, nor does he know what came of it after he gave it to the boy as before deponed to. Being specially interrogated, whether the Defender Mr. Anderson came riding to the stables alongst with him at the time he delivered the fish to the boy and whether or not he heard Mr. Anderson give the boy any direction about the fish. Depones that on their way home from Rankleburn the Deponent had occasion to speak to one or two people on the road, and Mr. Anderson proceeding onwards reached Tushielaw about fifteen minutes before the Deponent, and the Deponent did not hear him give any directions regarding the fish. Being interrogated whether or not upon the above occasion the Defender Mr. Anderson was actively employed to a degree less or more either by his horse's feet, a stick or a whip which he had in his hand in forcing the fish above deponed to from the water on to the rocks; Depones that Mr. Anderson was not active either with his stick or whip in forcing the fish out of the water, but his horse's feet, alongst with the feet of his servant's horse and that of the Deponent were the cause of forcing the fish out of the water upon the rocks. Being specially interrogated, whether or not the Deponent, Mr. Anderson and the servant amused themselves a good deal in forcing the fish from the water with their horses' feet before it went upon the rocks, or whether or not the fish leapt instantaneously from the water to the rocks upon the approach of the horses' feet, and whether or not they did not conduct themselves so towards the fish upon seeing it as to make a point of forcing it from the water or killing it therein with their horses' feet, Depones that the Deponent does not know whether or not Mr. Anderson or his servant partook of any amusement on this occasion but the Deponent had some amusement in seeing the fish make its various exertions. When Mr. Anderson's horse entered the stream, the fish run down past it, then past the Deponent's horse, but it appears that it did not run past the servant's horse, for it came up again, and when in the Act of repassing the Deponent's horse run itself out upon the stones and the Deponent killed it. Being interrogated, whether or not (when the fish was so employed in its different turnings

and windings) Mr. Anderson did not pursue it with his Horse's feet or whether or not Mr. Anderson allowed the fish gently to pass his horse's feet, without molesting it in the smallest degree or expressed himself well pleased at the entertainment the fish offered. Depones that so far as the Deponent observed, Mr. Anderson made no exertion with his Horse's feet or otherways in forcing the fish up or down the burn or upon the dry rock, but stopt his horse and looked back to see what the Deponent was doing. Being specially interrogated whether or not upon the above occasion, and before the fish was killed. . . . (This question not persisted in.) Being interrogated for the Defender, Depones that he does not recollect of any instructions whatever being given by Mr. Anderson as to carrying the fish home or leaving it on the rocks, nor does he recollect any thing particular of Mr. Anderson desiring him to be upon his guard, as he might incur a penalty by killing or carrying the fish home—*causa scientie patet*, all which is truth as he shall answer to God.

“(Signed) JAMES FRIER.

“CHA. ERSKINE.”

“Compeared Nelly Scott, Servant to Mr. Anderson the Defender, unmarried, aged thirty and upwards, solemnly sworn, purged *ut antea* and interrogated, Depones that the Deponent has been Mr. Anderson's servant for seven years and was so in November Eighteen hundred and ten. That at that period Mr. Anderson had a boy in his service of the name of Adam Baird who is now at New Posso. That about that time she recollects of James Frier the preceding witness coming one morning to Tushielaw and of going away with Mr. Anderson to look at some roads or other operations up Rankleburn. That they returned in the course of the day, but whether before or after dinner she does not remember nor does she remember whether Mr. Frier dined at Tushielaw that day or not. That that day a fish was brought into the kitchen, but by whom she does not recollect, fourteen or fifteen inches in length as she thinks, being one of those trouts which come up the burns about the Martinmas time, and which fish she boiled, and she has no doubt but that it was made use of in Tushielaw house, but whether on the day it was brought in or on a subsequent day she does not remember. That the servant who that day accompanied

Mr. Anderson is now in his service, and his name is Robert Hope—*causa scientie patet*, all which is truth as she shall answer to God.

“(Signed) NELLY SCOTT.

“CHA. ERSKINE.”

It was not until March following that Sir Walter disposed of the case. This he did by the following interlocutor:—

“SELKIRK, 24th March 1813.—The Sheriff having advised the proof led and whole cause, finds that the pursuer has failed to prove either that Mr. Anderson killed or had in his possession a salmon trout, Bull trout, Salmon, or Whiting, contrary to the provisions of the Act, therefor assoilzies the Defender, and Decerns, But in respect of the circumstances set forth in the proof finds no expenses due.

“(Signed) WALTER SCOTT.”

67.

1813.—*Lease: Contravention of Terms: Outgoing Crop.*

THOMAS M'MILLAN, Esquire of Shorthope, *against* ROBERT SCOTT, tenant of Shorthope.

In this action the pursuer craved the Court to find that the defender had acted most illegally in cultivating any part of the farm (his lease having expired and he being about to remove from the farm), to find him liable in £20 damages to the pursuer for such illegal cultivation, and to interdict the defender from proceeding further “in the preparing, cultivating, plowing or sowing any part of the said Lands of Shorthope.”

The Sheriff-Substitute¹ in his deliverance ordering service on the defender granted interim interdict “until the petition and Answers are advised.”

In his Answers the defender stated that when he entered on his lease of Shorthope the land and garden were under crop, being the outgoing crop of the preceding tenant, and that of this crop that tenant reaped the benefit; “and, as the tenant who preceded him enjoyed the benefit of an outgoing crop he cannot see upon what principle of law he should be deprived of the same privilege.”

The pursuer in his Replies denied that any part of the land was

¹ An Honorary Sheriff-Substitute, William Borrowman, surgeon in Selkirk, appointed 20th March 1800.

under crop at the defender's entry, except the garden, which was used for domestic purposes, and he quoted from the tack between parties to show that anything of the nature of an outgoing crop was expressly debarred.

The Sheriff issued this interlocutor:—

“SELKIRK, 20th April 1813.—The Sheriff-Depute having advised this process, continues the Interdict as to the garden, and finds the tenant not entitled to crop the same this season. But in respect the tenant avers and offers to prove that the tenant who preceeded him in possession had an away-going crop the Sheriff finds such averment relevant and allows him a proof of the same and also of the extent of the said away-going crop and allows the Respondent a counter probation as accords, meanwhile removes the Interdict discharging the said Robert Scott from ploughing and cultivating a proportion of land corresponding to that which was under crop at his entry provided always that he neither takes up land unfit for the plough nor exceeds the quantity he alleges to have been cropped by the former tenant at his away going, all which as he shall be answerable.

“(Signed) WALTER SCOTT.”

It would appear that the case was then settled out of Court, as there is no trace of further proceedings.

68.

1813.—*Winter Herding Act*, 1686.

WALTER ORMISTONE, tenant in Fairnileehaugh, *against* JOHN LITTLE, tenant in Fairnilee.

An action for £20 damages, and the statutory penalty, under the Winter Herding Act, 1686 (Act Jac. VII. cap. 11), in respect of trespass by the defender's sheep.

The following interlocutor, in Sir Walter's handwriting, was pronounced:—

“SELKIRK, 30th April 1813.—The Sheriff-Depute having advised this process, in respect that the Defender kept a regular herd, and also that the pursuer has omitted to detain the cattle while trespassing, finds that the statutory penalties do not apply,

and in so far assoilzies the Defender from the conclusions of the libel and Decerns; But finds the Defender liable in the Actual damages done by his sheep to the pursuer's sown grass, and in the admitted circumstances of the case modifies the same to three guineas and decerns therefor and for expenses of process.

“(Signed) WALTER SCOTT.”

(This old statute, which is still in observance, enacts that “all heretors, liferenters, tenents, cotters, and other possessors of lands and houses shall cause herd their horses, nolt, sheep, suyne, and goats, the whole year, as well in winter as in summer, and in the night-time shall cause keep the same in houses, folds, or enclosures, so as they may not eat or destroy their neighbour's ground, woods, hedges or planting; certifying that such as shall contraveen, they shall be liable to pay half a merk, *toties quoties*, for ilke beast they shall have going on their neighbour's ground, by and attour the damage done to the grass or planting; and Declares that it shall be lawful to the heretor or possessor of the ground to detain the said beasts untill he be paid of the said half-merk for ilke beast found upon his ground, and of his expences in keeping the same.”)

69.

1813.—*Succession: Authority to Widow to Sell Effects.*

AGNES STEVENSON, relict (*i.e.* widow) of William Pringle, Wright in Selkirk, petitioner.

The petition stated that the petitioner's husband died some weeks previously (leaving four daughters, “most of whom” were resident in different parts of the country), possessed of a dwelling-house and yard in Selkirk, and of some moveable property, consisting chiefly of wood and tools, which were lying open and unprotected. To secure the property for the behoof of the executors, and to prevent its being carried away and stolen, the petitioner had advertised a sale of the effects by public roup, and she now asked the Court to grant warrant to, and to authorise, the Clerk of Court to conduct the sale.

By interlocutor of 20th April 1808, the Sheriff-Substitute¹ granted warrant to the Clerk of Court to conduct the sale.

¹ Mr. William Borrowman, an *Honorary* Sheriff-Substitute.

The sale was conducted by Mr. Andrew Lang, Sheriff-Clerk. He thereafter lodged his report, and the following interlocutor was pronounced :—

“SELKIRK, 14th July 1813.—In respect of the smallness of the sum which cannot allow the regular proceedings to take place the Sheriff-Depute grants Warrant to and Ordains the Clerk to divide the same *pro rata* among the creditors of William Pringle claiming upon liquid proceeds of debt and when he has reported such division to the Sheriff with the receipts of the Creditors the Sheriff will exoner him of the funds received.

“(Signed) WALTER SCOTT.”

70.

1813.—*Trespass : Damage to Crop.*

JOHN BOYD, Esquire, of Broadmeadows, *against* GIDEON SCOTT, tenant in Kirkhope.

Action of damages—£10 for damage sustained through trespass, and £10 for damage to crop through allowing cattle to stray.

The circumstances and judgment are set forth at p. 71.

71.

1813.—*Agency : Ship ; Freight, etc. : Terms Quoted to Agent.*

JAMES KIDD, manager for the Leith and Hull Shipping Company, *against* JAMES CUNNINGHAM, tenant in Gamescleugh.

Action for £19, 14s. 7d. being freight and insurance of wool shipped to Hull in the pursuer's smacks. The circumstances and judgment are set forth at p. 66.

72.

1814.—*Damages for Destroying Dog.*

JAMES ANDERSON, tenant in Whitslaid, with concurrence of the Procurator-Fiscal, *against* WILLIAM RAE, herd in Shaws, and JOHN OLIVER, herd there.

This was an action for damages, and for penalty, for killing a pointer dog.

The circumstances and judgment are set forth at p. 84.

73.

1814.—*Boundaries : Fixing Boundary.*

JAMES JOHNSTONE, Esquire of Alva, *against* THE EARL OF TRAQUAIR.

This was an action to fix the boundaries of the lands of the pursuer and defender along the top of Minchmoor. (See also p. 52.)

The interlocutors in the case (all in Sir Walter Scott's handwriting) were these:—

“SELKIRK, 28th July 1813.—The Sheriff-Depute appoints the right Honble. Earl of Traquair to lodge Duplies in which, holding the replies as a special Condescendence, his Lordship will state what he avers and offers to prove to be the March between his lands of West Bold and the petitioner's lands of Hangingshaw and Lewinshope.

“(Signed) WALTER SCOTT.”

“SELKIRK, 10th Novem. 1813.—The Sheriff having considered this process allows to both parties a conjunct probation of their averments touching the disputed line of March and further appoints a sketch of the disputed ground to be lodged in process to be made by a land measurer at the sight and expence of both parties and the disputed lines to be marked thereupon in such a manner that they may correspond with the deposition. . . .”

(The remainder of this interlocutor is torn out.)

“SELKIRK, 13th July 1814.—Appoints the proof to proceed on the ground on Friday the 29 curt. at eleven o'clock forenoon and grants Diligence to both parties for citing witnesses.

“(Signed) WALTER SCOTT.”

“SELKIRK, 15th October 1814.—The Sheriff-Depute having perambulated the March in question in presence of the parties prors. and having considered the proof adduced by the aged witnesses finds the line of March between the farms of Lewinshope and West Bold to be the Waterfall of the hill and that it extends in the line marked by square pits at sight of the Sheriff and by the small heaps of stones set up as mentioned in the examination of John Watson and Thomas Hope and decerns and declares accordingly each party bearing his own expences and that of Extract and of the surveyor's plan being paid by them mutually.

“(Signed) WALTER SCOTT.”

74.

1814.—*Hiring of Moveables; Hiring or Loan.*

JAMES INGLIS, merchant in Selkirk, *against* GEORGE YOUNG, Saddler in Selkirk.

Action for goods supplied and glasses lent for the entertainment given on the King's birthday.

The circumstances and judgment are set forth at p. 73.

75.

1815.—*Poor Law: Maintenance of Child.*

JAMES TAITT, residing at the Cleugh, in the Parish of Cavers and County of Roxburgh, petitioner.

Action to be relieved of the maintenance of a child.

The petitioner stated that James Scott, sometime mason in Hawick, came to the petitioner's house and left with him a child six months old, stating that he was the father and that the mother was Jane Hall, a native of Selkirk. Scott had paid aliment of the child for a few years, had then ceased to do so, and had left the country. Taitt craved that the parish of Selkirk should relieve him of the burden of maintenance. The petition was intimated to the Kirk-Session and Heritors of Selkirk, who in reply stated that by an absolute paction between the County and Burgh of Selkirk "each are separately taken bound to maintain their respective paupers, and that the Magistrates of Selkirk are the proper persons to relieve the petitioner."

The following interlocutor (written by Sir Walter Scott) was issued:—

"SELKIRK, 16 Feby. 1814.—The Sheriff-Substitute having advised with the Sheriff-Depute finds that the Heritors and Kirk-Session of the Parish of Selkirk are the parties legally liable in support of the poor of the parish. Therefore Decerns and Ordains them to relieve the Petitioner of the expence of maintaining the child in question reserving their relief against the Town of Selkirk in virtue of any paction between them to that effect.

"(Signed) CHAS. ERSKINE."

The magistrates of Selkirk sisted themselves in the process, and reclaimed against the above interlocutor. They stated that both parents

of the child were within the kingdom, that the mother was married and had resided in the parish of Crichton for more than three years, and had not been resident in Selkirk parish "for 3 years at one time for above these 10 years past."

The Sheriff pronounced the following interlocutor:—

"SELKIRK, 20th April 1814.—The Sheriff-Depute having advised this petition and Answer finds the petitioners¹ are primarily liable in maintenance of the child reserving to them full recourse against the parents if they are in a situation, as stated, to relieve the parish of the burthen. Therefore refuses the prayer of the petition and adheres to the Interlocutor reclaimed against.

"(Signed) WALTER SCOTT."

The magistrates again reclaimed and this interlocutor was pronounced:—

"SELKIRK, 16 Novem. 1814.—The Sheriff-Depute after advising this petition and Answer Adheres to the Interlocutor reclaimed against and refuses the prayer of this petition.

"(Signed) WALTER SCOTT."

Note.—"This is a question of considerable nicety and importance. But the English Law positively finds the place of Birth of a natural child *primarily* liable in aliment and there seems no reason to think the Scottish law differs in this particular. All Acts of Parliament as 17 Geo. II. cap. 5 and 20 Geo. III. cap. 54, S. 25 which give the bastard child in particular cases not here alleged to exist the benefit of the Mother's Settlement are exceptions to a general rule introduced by express Statute and therefore serve to affirm the proposition in the general case."

In a minute by the pursuer, James Scott, craving the Sheriff to fix the rate of aliment, the following interlocutor (in Sir Walter's handwriting) was pronounced:—

"SELKIRK, 8 February 1815.—The Sheriff-Substitute having advised with the Sheriff-Depute modifies the aliment to the sum of four pounds sterling per annum commencing in June 1809 and

¹ *I.e.* the *reclaiming* petitioners (the magistrates), the "paction" being here recognised by the Sheriff.

Decerns therefor deducting partial payments Finds the Defenders liable in expenses which always follow in alimentary cases.

“(Signed) CHAS. ERSKINE.”

76.

1815.—*Compensation : Set-off of Debt Due to Executors.*

ANDREW LAIDLAW, residing at Craikshiells, *against* ANDREW LAIDLAW, residing at Deephope.

This was an action for payment, with a defence of right to set-off.

The defender and James Laidlaw, deceased, tenants of the farm of Auckenskew in the county of Dumfries, sublet the farm to John Scott, Locharben. John Scott paid the first half-year's rent (£59) to the defender, but the defender refused to pay to the pursuer (heir of the deceased) his half of the £59. The defender produced a bill for £112 by the deceased James Laidlaw and pleaded set-off.

The following are the interlocutors in the case, all written by Sir Walter Scott:—

“SELKIRK, 2 *March* 1814. — The Sheriff-Substitute having advised with the Sheriff-Depute finds that unless the copy of the Tack produced be admitted as genuine the pursuer must support his libel by recovery of the original, therefore appoints the Defender to confess or deny by a writing under his hand whether the said copy be genuine or not and in what he alleges it differs from the original also grants diligence at the pursuer's interest against havers¹ for recovery of the original which he may follow up by letters of Supplement in case the Havers reside without the Sheriff's jurisdiction.

“(Signed) CHAS. ERSKINE.”

“SELKIRK, 28 *December* 1814.—The Sheriff-Substitute having consulted with the Sheriff-Depute and having considered the Defences and Answers before Answer Appoints the Defender to undergo a judicial examination concerning the circumstances in which this bill now produced was granted and appoints for that purpose the Eleventh day of January next under certification.

“(Signed) CHAS. ERSKINE.”

“SELKIRK, 22 *March* 1815. — The Sheriff-Depute having advised this process finds that the debt founded upon by the

¹ *I.e.* persons *having* or holding the document.

Defender in consequence of the bill produced is a debt due (if at all) by the Executors of whom the defender is himself one; finds therefore that it cannot be stated in compensation of a claim due to the Heir unless the Executors had been previously discussed. Therefore repels the Defences and of new Decerns in terms of the libel and finds expences due.

“(Signed) WALTER SCOTT.”

77.

1815.—*Parent and Child: Illegitimate Child: Rate of Aliment.*

ISABELLA MOFFAT, housekeeper, Spotiswood, *against* GEORGE HALDANE, in Galashiels.

An action for £30, 12s., being the balance of an account for aliment, etc., of a female illegitimate child. The rate of aliment claimed was £8 per annum. In the defences the defender contended that “the rate is too high for people in the rank of himself and the pursuer.”

He said “he was bred a mechanic, and carried on business of a wright, and on ceasing to carry it on owing to his circumstances being reduced he is now compelled to betake himself to the humble trade of an innkeeper in the village of Galashiels.”

The Sheriff pronounced the following interlocutor (which is in Scott's handwriting):—

“SELKIRK, 8 *December* 1813.—The Sheriff-Substitute having advised with the Sheriff-Depute modifies the aliment pursued for to the sum of Six pounds a year being thirty-nine pounds sterling for six years and a half and decerns for the balance which shall remain due to the pursuer after such modification being Seventeen pounds twelve shillings. But finds no expences due.

“(Signed) CHAS. ERSKINE.”

The defender lodged a counter-claim, and the following interlocutor was pronounced:—

“SELKIRK, 20 *April* 1814.—The Sheriff having advised this petition and Answers with the Counter Summons and Defences Conjoins the actions and in the original action adheres to the Interlocutor reclaimed against and refuses the prayer of the petition and in respect the account produced in support of the Counter libel is undated and unvouched, Sustains the defences of

Isabel Moffat and assoilzies her from the conclusions of the said counter claim finds her entitled to expences thereon Modifies the same to Ten shillings and Decerns But refuses to Decern for payment of the aliment in time to come untill the said Isabel Moffat shall repeat a summons containing conclusions to that effect.

“(Signed) WALTER SCOTT.”

The defender lodged a reclaiming petition, and the following interlocutor was issued:—

“SELKIRK, 27 *July* 1814.—The Sheriff-Depute having advised this reclaiming petition with Answers finds that the letter from Isabel Moffat acknowledges the receipt of certain articles to account of the aliment—find that there is also evidence from the letter from Mr. Craig that Haldane had paid about thirty pounds for the maintenance of the child. Therefore recalls the Interlocutor reclaimed against and founding upon the above evidence as well as the acquiescence of the original pursuer for so many years finds that the child has been sufficiently alimented Assoilzies the petitioner from the conclusions of the original action and Isabel Moffat from those of the counter-action and Decerns But finds expences due to neither party.

“(Signed) WALTER SCOTT.”

An additional summons for future aliment having been lodged, the following interlocutor and note in Sir Walter's handwriting were issued:—

“SELKIRK, 22 *March* 1815.—The Sheriff having advised this additional Summons with Defences Note for Isabel Moffat, etc., finds that the burthen of alimenting the child in such cases as the present is not an exclusive burthen upon the father where the mother has the means of contributing thereto in reasonable proportion therefore adheres to his Interlocutor of 27th July finding that the child has been in this case sufficiently alimented and with respect to its past aliment so far as not already decerned for Decerns against the Defender at the rate of four pounds yearly subsequent to the 26th October 1812 and in time coming untill the Defender agreeably to the offer in the Defences shall remove her into his own family and finds expences due to neither party.

“(Signed) WALTER SCOTT.”

Note.—“In respect that this cause has been repeatedly before

the Sheriff he requests the parties if dissatisfied with his judgment to seek redress elsewhere."

78.

1815.—*Affiliation.*

ANN CHERRY, residing at Galashiels, formerly servant at Selkirk South Common, *against* JOHN NICOL, residing at Selkirk South Common.

This was an action of affiliation and aliment. In the course of it the defender not only denied the pursuer's averments, but suggested that the father of the child might be one of the French prisoners of war in the district.

The interlocutor disposing of the case was as follows:—

"SELKIRK, 2 April 1815.—The Sheriff, in respect of the Defender's oath *ad litem*, assolzieis him from the present Action, and Decerns, finds expences due and allows an Account thereof to be lodged.

"(Signed) WALTER SCOTT."

79.

1815.—*Hiring of Services: Escort of French Prisoners of War.*

WILLIAM SCOTT; THOMAS LUN, Senior; THOMAS LUN, Junior; JOHN LUN; WALTER M'GILL; JOHN BLAIKIE; JOHN ROBERTS; JOHN OLIVER; ANDREW OLIVER; MICHAEL BRADE; THOMAS SANDERSON; THOMAS WILSON; JOHN LEITHEAD; JOHN TURNBULL; and JAMES LEES, all in Galashiels, *against* ALEXANDER TURNBULL, Whitebanklee.

An action to recover £5, 11s. said to be due under employment to assist in escorting from Whitebanklee to Selkirk seven French prisoners of war.

The circumstances and the judgments are set forth at p. 78.

80.

1816.—*Lease: Interest on Sums Expended by Landlord.*

THE MAGISTRATES OF SELKIRK *against* DAVID MINTO, tenant in Linglie.

This action arose out of a dispute as to the sums expended and to be expended on building and fencing on Linglie Farm, upon which the tenant was charged 6 per cent.

The following interlocutors (all written by Sir Walter Scott) were issued :—

“SELKIRK, 28th June 1809.—The Sheriff-Substitute having advised with the Sheriff-Depute finds that the Inclosures must be completed before the tenant is liable in payment of Interest for the money expended, therefor reserves that point until a report shall be made that they are perfectly fencible, understanding always that the Magistrates are not bound to build a fence in that spot where a natural precipice renders one unnecessary, but only to complete the natural fence by an artificial one, and the Sheriff repells the Defence in so far as it is founded upon the allegiance (*sic*) that the dykes might have been more cheaply executed, as to the money expended in repairing the houses and offices, the Sheriff finds David Minto liable in payment of interest upon the various sums expended in repairs from the dates libelled at the rate of six per cent. and Decerns and declares accordingly ordaining him further to make payment of interest at the same rate upon the said sums during all the years of his lease.

“(Signed) CHA. ERSKINE.”

“SELKIRK, 22 August 1810.—In order that this whole cause may be kept together and if possible sent out of Court at once the Sheriff makes avisandum with this petition and answers until a report by neutral persons on the present state of the inclosures and for that purpose Remits to Messrs Mill and Brodie the gentlemen formerly named again to visit the premises so soon as the Magistrates of Selkirk shall have executed the remaining part of the inclosures and to report on their state.

“(Signed) WALTER SCOTT.”

“SELKIRK, 12 June 1811.—The Sheriff-Substitute having advised with the Sheriff-Depute and having considered the petition answers report and whole cause finds David Minto liable for interest upon the following sums and from the periods annexed to each and that during the continuance of his tack, 1stly upon the sum of One hundred and sixteen pounds four shillings and threepence from the term of Whitsunday Eighteen hundred and six being the expense of inclosing the Todholes, 2ndly upon the sum of two hundred and seventy two pounds, sixteen shillings and ninepence being the expense of the inclosures ordered by the Sheriffs Inter-

locutors of thirty first July Eighteen hundred and five and twenty sixth February Eighteen hundred and six and that from the term of Whitsunday Eighteen hundred and nine, Decerns in payment of the interest upon the said sums from the said dates at the covenanted rate of six percentum But assolzies the said David Minto from the payment of interest on the sum of fifty two pounds five shillings and nine pence being the expense of an inclosure round the Hill Park or spaining folds reported by Messrs. Mill & Brodie to be superfluous and Decerns But finds no expenses due to either party.

“(Signed) CHA. ERSKINE.”

At this stage Minto, having been charged to pay in terms of this last interlocutor, carried the case to the Court of Session on a note of suspension of the charge. In that proceeding Lord Gillies pronounced the following interlocutor:—

“18 *December* 1811.—The Lord Ordinary having heard parties’ procurators on the grounds of the charge and reasons of Suspension, Suspends the letters *simpliciter*.”

Meanwhile Minto also presented a reclaiming petition to the Sheriff asking him to reconsider the interlocutor. Sir Walter pronounced this interlocutor:—

“SELKIRK, 8 *January* 1812.—The Sheriff-Depute having resumed consideration of this Petition and advised the same with the answers refuses the prayer thereof and Adheres to the Interlocutor reclaimed against.

“(Signed) WALTER SCOTT.”

The case proceeded, and these interlocutors were issued:—

“SELKIRK, 24 *November* 1813.—In obedience to the remit from the Supreme Court the Sheriff-Depute having personally visited the premises Finds that the back wall of the old stable is still standing as alleged in the Magistrates Condescence and as partly admitted in that of David Minto and forms part of an indifferent cottage for which the tenant alleges that he pays £2, 3s. of rent Finds that even were no rent paid it does not appear that the tenant derives any such advantage from this cottage as to subject him to the interest of six per cent. in the outlay for building the same. And with respect to the principal point in dispute Finds that the Magistrates in order to found a

claim for interest upon the outlay for the slated roof as charged for ought to prove that the tenant had expressly desired to have a slated roof instead of a thatch. Finds that the Supreme Court by their remit to the Sheriff-Depute have virtually found that the entry in the Books of the Burgh was insufficient evidence of this alteration having been made at the tenant's request although it had been sustained as such by the Sheriff-Depute. Therefore appoints the magistrates to state in a Minute by what additional proof they propose to establish the fact that the stable and byre were slated (instead of being thatched) *at the special request of the Tenant himself* and appoints the Suspender to answer the said Minute.

“(Signed) WALTER SCOTT.”

“SELKIRK, 16 *February* 1814.—The Sheriff-Substitute having consulted with the Sheriff-Depute declares that he will anew visit the premises upon the day of and appoints both parties to attend under certification.

“(Signed) CHA. ERSKINE.”

“SELKIRK, 3rd *May* 1814.—The Sheriff-Depute having again visited the premises this day in the presence of both parties and their prors. finds that the reclaiming petition is founded upon a misapprehension of his Interlocutor of the 24th November last which was not intended to assoilzie the tenant from the payment of £2, 2s. 4d. yearly in the name of rent or interest upon the outlay expended for building the small slated house or cottage therefore adheres to the said Interlocutor with this explanation that the tenant shall continue to pay the said sum of £2, 2s. 4d. but nothing more on account of that Cottage or range of Cottages partly newbuilt and partly repaired and with respect to the proof offered as to the request of Mr. Minto to have the houses slated rather than thatched finds that the evidence proffered by Oath of Mr. Dun and Mr. Anderson is not competent unless Mr. Minto consents thereto and appoints the said David Minto to lodge a Minute signed by himself stating whether he will agree to their being examined as in the cause and that *quam primum*.

“(Signed) WALTER SCOTT.”

“SELKIRK, 23 *May* 1814.—The Sheriff-Substitute having advised with the Sheriff-Depute Finds the proof offered by the Magistrates

of Selkirk incompetent and therefore finds that they have no claim upon David Minto for the difference of price between a slated and thatched roof for the offices, reserving to them the benefit of reference to his oath if they shall be so advised and as that reference has been offered by their prors. requires them to state by a Minute under their hand if they mean to abide thereby when the Sheriff will pronounce such a judgement as shall exhaust the cause.

“(Signed) CHA. ERSKINE.”

“SELKIRK, 27th July 1814.—The Sheriff-Depute having advised David Minto's deposition *ad litem* and proceeding in obedience to the remit from the supreme Court finds the said oath negative therefor assoilzies David Minto from the claim of the Magistrates for Thirty six pounds seventeen shillings and elevenpence half-penny sterling being the accumulated interest charged upon the extra expense of the slated roofs put upon the byre and stable and Decerns, finds the Magistrates liable in the expenses incurred both in this Court and the Supreme Court as the latter shall be ascertained by the report of the Auditor and appoints an account of the expenses incurred in this Court to be given in.

“(Signed) WALTER SCOTT.”

“SELKIRK, 15th November 1815.—The Sheriff-Depute having advised this account of expenses with Answers and Replies finds that the effect of the suspension and remit was to open up the Sheriff's Decree as to expenses as well as the principal question in dispute But finds that David Minto is not entitled to the expenses incurred in the Sheriff Court down to the twelfth June 1811 when the litigation respected points on which Mr. Minto was unsuccessful disallows the sums charged for such previous expenses being £6, 7s. 1d. but sustains the rest of the account in so far as charged according to regulations being thirty four pounds nineteen shillings and one half-penny sterling and Decerns therefore.

“(Signed) WALTER SCOTT.”

“SELKIRK, 21 August 1816.—The Sheriff having advised this Minute and Answers, in respect the point submitted to his review in the proceeding referred to included a question of form attended with considerable doubt refuses to allow the additional expenses incurred.

“(Signed) WALTER SCOTT.”

81.

1816.—*Bill of Exchange and Loan.*

ANDREW BARRIE, residenter, Selkirk, *against* JOHN HEITON, wright, Philiphaugh.

This was an action for £50 contained in a bill, and for £8 and £6 lent to defender.

The judgment in this case is in the following interlocutor:—

“SELKIRK, 21 *August* 1816.—The Sheriff having advised this process finds that the defender has no title to found upon the two bills of £30 each formerly accepted by him and retired in consequence of that acceptance in compensation of the bill of £50 presently sued for on which his name also stands as acceptor, and which he acknowledges to have been granted for a balance due to the Drawer, therefore finds him liable in payment of the said fifty pounds with interest conforming thereto and decerns. Finds that the sums of £8 and £6 of borrowed money are unvouched and must be held as compensated in full by the counter-claims of the Defender for wright work and small advances of cash and therefore, reserving to the pursuer the benefit of reference to the Defender's oath on the amount of these counter-claims, the Sheriff Assoilzies the Defender from the conclusions of the libell in so far as respects the said sums of £8 and £6 and decerns and finds expenses due to neither party.

“(Signed) WALTER SCOTT.”

82.

1816.—*Interdict: Trespass.*

GEORGE PARK, tenant in Oakwoodmill, *against* ANDREW COWAN, contractor, now residing at Oakwood.

Petition for interdict against defender, while building a march dyke, against opening up quarries, etc., on pursuer's farm.

The circumstances and judgments are set forth at p. 87.

83.

1817.—*Defamation.*

ADAM LAIDLAW, cattle dealer, Preiston, *against* THOMAS ANDERSON, farmer, Sundhope.

This was an action concluding for £1000 for defamation of character,

the pursuer alleging that the defender in different companies stated that "the Complainer is a Forger and that he forged and issued or put into circulation Bills forged by him upon other persons wherewith to support his credit."

The Sheriff first issued the following interlocutor and note:—

"SELKIRK, 7th August 1816.—The Sheriff-Depute before answer allows the pursuer a proof of the facts set forth in his libel and the Defender a conjunct probation as accords.

"(Signed) WALTER SCOTT."

Note.—"The Sheriff requests parties and their advisers to consider whether this cause be not peculiarly fitted to be tried in the jury court rather than before a Judge ordinary."

By minute the defender objected to the jury trial on the ground of expense, and proposed a limitation of the proof "to the report libelled and the way in which it was communicated to the pursuer."

The next interlocutor was as follows, and is in Sir Walter's handwriting:—

"SELKIRK, 8 January 1817.—The Sheriff-Substitute having consulted with the Sheriff-Depute finds it impossible as well as inexpedient to divide the cause or the proof and therefore of new allows the pursuer a proof of his libell as well of the damage which he states himself to have sustained through the scandal as of the scandal itself and allows the Defender a counter probation as accords.

"(Signed) CHA. ERSKINE."

The case must have been settled; no further steps are to be found in the process.

84.

1817.—*Master and Servant: Alleged Wrongous Dismissal.*

JOHN HORSBURGH, Blackhaugh, against JOHN MARK, tenant in Mossilee.

An action for damages for alleged wrongful dismissal.

The circumstances and judgment are set forth at p. 86.

85.

1817.—*Tweed Fisheries Act: Statutory Offence: Period within which Prosecution must be brought.*

GEORGE RODGER, Procurator-Fiscal, Selkirk, *against* JOHN TURNER, forester at Ellibank.

The procurator-fiscal served a summons charging Turner with illegal fishing during close time.

In his defences the defender pleaded that the action was incompetently brought in respect it should have been raised by way of petition and not by summons. On this plea the following interlocutor was pronounced:—

“SELKIRK, 15 *October* 1814.—The Sheriff-Depute having advised this Summons with the defences upon the point of form allows the pursuer to amend his libell by lodging a petition in terms of his summons and directs the same to be seen and answered upon the merits.
“(Signed) WALTER SCOTT.”

Turner further pleaded that the prosecution had not been brought within the period required by the statute. This was disposed of, at this stage, by the following interlocutor (in Sir Walter's handwriting):—

“SELKIRK, 22 *Febry.* 1815.—The Sheriff-Substitute having advised with the Sheriff-Depute in respect action has been commenced within the six months in terms of the Statute and that the lodging of the petition is a mere amendment of the libel in point of form. Adheres to the Interlocutor reclaimed against and refuses the prayer of this petition.

“(Signed) CHA. ERSKINE.”

A proof was led which altered the complexion of the case in the matter of date. Sir Walter Scott disposed of the case by this interlocutor:—

“SELKIRK, 8 *January* 1817.—The Sheriff-Depute having considered the petition with defences, proof and whole cause In respect the proof applies to an act of fishing committed before Martinmas 1813 and that the present action was not raised untill the 22 day of June thereafter, a period exceeding the statutory limitation

of six months; refuses the prayer of the petition assolzie the respondent and decerns, and finds him liable in the expenses incurred, in terms of the Statute.

“(Signed) WALTER SCOTT.”

86.

1817.—*Water : Interference with Supply.*

ARCHIBALD DUNLOP, of Whitmuir, *against* THOMAS NICHOL, tenant in South Common, also the MAGISTRATES OF SELKIRK, proprietors of said farm.

This was a petition for interdict.

The petition recites that a field on Whitmuir has always been supplied with water from a moss¹ on South Common, and that the tenant Thomas Nichol has commenced certain operations which will divert the water of the moss from the petitioner's field, and craves for interdict.

The Sheriff-Substitute, on 24th August 1814, assolzie the Town Council and allowed a proof as against Thomas Nichol. It seems from the process that the proof did not proceed; but on the back of a minute for the defender the following appears, in Sir Walter's handwriting, unsigned and undated:—

“The Sheriff-Substitute will take the trouble to visit the moss and see whether there may not be some means of accommodating both parties in this matter. Constructing a reservoir to a proper level with drain to discharge the waste water seems the natural remedy.”

The Sheriff-Substitute reported, and the following interlocutor was pronounced:—

“SELKIRK, 7th August 1816.—The Sheriff-Depute appoints the drain to proceed in the direction pointed out by the Sheriff-Substitute and the reservoir to be made of such a depth and width as to afford reasonable and fitting accomodation for Mr. Dunlop's cattle Finds that this must be done at the sight of the Sheriff-Substitute and that Mr. Dunlop will bear the burthen of supporting the reservoir when properly made and further finds it unnecessary to consider the question of the spring well until it shall appear that it is endangered by the operations of the defender and Decerns.

“(Signed) WALTER SCOTT.”

¹ A marshy or boggy place.

The petitioner reclaimed, and the following interlocutor was pronounced:—

“SELKIRK, 8 *January* 1817.—The Sheriff-Depute having advised this petition and answers in respect that there is a clerical error in the Interlocutor reclaimed against in so far as the name of Dunlop is inserted for that of Nicol at the end of the fifth line. Recalls the same and finds that the burden both of making and upholding the proposed reservoir falls upon the Town of Selkirk and their tenant in respect the proposed drain is an innovation upon the manner in which the relative properties have hitherto engaged the use of the water, and farther finds that, unless the Town of Selkirk enact themselves to maintain to the petitioner Dunlop the free use of the water by maintaining the reservoir, the former state of possession must be recurred to.

“(Signed) WALTER SCOTT.”

87.

1817.—*Lease : Abandonment of Lease : Cropping.*

JOHN MURRAY, of Philiphaugh, *against* ROBERT LAIDLAW, tenant in Philiphaugh, and his trustees.

The defender became tenant of Philiphaugh by lease dated 6th October 1803. He handed over his farm to trustees for behoof of his creditors at a time when there were still some years of the tack to run. The pursuer claimed that the mode of management to be observed must be considered as in the situation of the last year of the tack.

The Sheriff-Substitute (Erskine) found that crop 1816 had, in the circumstances, to be considered the waygoing crop. A great many minutes, etc., were lodged. The following deliverances were issued by the Sheriff:—

“SELKIRK, 17 *February* 1816.—The Sheriff-Substitute having advised with the Sheriff-Depute he nominates and appoints Mr.

Park, tenant or late tenant in Caterhaugh to visit the above farm with Messrs. Grieve and Thorburn in place of Mr. Andrew Thomson indisposed as above appoints the visitation to proceed *quam primum* and in the mean time removes the Interdict in order that the farm may not lie waste and the time of labour be lost enjoining however the trustees to confine their operations to those parts of the farm which fall to be ploughed in

regular rotation of crop and continuing the interdict as to pasture or lealand.

“(Signed) CHA. ERSKINE.”

“17 *Feby.* 1816.—In respect it is stated that Mr. Park is one of the Trustees on Mr. Laidlaw’s Estate, recalls his appointment and in place of him nominates Mr. George Anderson farmer at Nether barns to make the visitation along with Messrs. Grieve and Thorburn.

“(Signed) CHA. ERSKINE.”

“SELKIRK, 13 *March* 1816.—The Sheriff-Depute having advised this condescendence finds that the circumstances condescended upon respecting the fields Nos. 3 and 5 seem to place the cropping them out of the rules of good husbandry, and therefore Appoints the condescendence upon this point to be seen and answered against next Court day, and in the mean time continues the Interdict; But with respect to the other fields finds that the tack has pointed out the quantity of grass to be left at the expiry of the lease and left the tenant at liberty otherwise during its currency and therefore that the circumstances of inconvenience founded upon by the landlord are such as he must have contemplated the possibility of his being subjected to. Therefore recalls the Interdict excepting as to the quantity of grass land pointed out in the last Interlocutor and the fields Nos. 3 and 5.

“(Signed) WALTER SCOTT.”

“SELKIRK, 14 *March* 1816.—The Sheriff having resumed consideration of this process with the Report of the Farmers agreeable to remit and the observations and objections lodged for both parties and being desirous to forward the cultivation of the farm reserving questions of right to both parties; Finds 1tly, That the Respondent must leave *one sixth part* of the arable land in grass in terms of the lease and laid down in the manner therein prescribed, and approves of the Report in so far as it specifies the places to be sown down where that has not yet been done; Sustains the objection of the petitioner to the report, in so far as the quantity of grass ground to be left is therein stated at one hundred and two acres, and finds it proved by the measurement in process that the sixth part of the farm to be left in grass as above mentioned amounts to one hundred and thirty six acres; 2dly, Finds that the tenant must leave a fallow-break of eighty two acres, reserving to both parties the question how far he is entitled

to compensation from the landlord; 3dly, In respect it is alleged in the objections that the ploughing up the fields marked in the measurers Survey Nos. 3, 5, 6, 9, and 16 will be ruinous to the farm, and attended with trifling benefit to the tenant, the Sheriff will continue the Interdict as to all or any of these fields, upon the landlord lodging a condescendence within twenty four hours specifying the said averment, But under certification always that if the landlord fail to shew that the ploughing of the said Parks is contrary to good husbandry and ruinous to the farm, he will be liable in damages to the tenant: And Lastly the Sheriff recalls the interdict excepting as to the sixth part or One hundred and thirty six acres aforesaid and as to the fallow and as to the said parks No. 3, 5, 6, 9, and 16 and on the last point the Sheriff remits to the Sheriff-Substitute to recall the same entirely or partially according to the terms of the condescendence appointed to be lodged and Decerns.

“(Signed) WALTER SCOTT.”

Notes.—“As this is a question of importance parties may wish to know the Sheriff’s view of the case more fully than they can be given in an Interlocutor.

“*1tly.* He cannot agree with the Reporters in viewing the present as an away going crop. It is no doubt, unfortunately for both parties Mr. Laidlaw’s *last* crop, but that does not bring it under the regulations of the crop which was intended to terminate the lease, and which were settled by both parties on the faith that it was to be implemented for the full tract of time therein stipulated. Nevertheless the stipulation in the lease that one-sixth part of the arable land shall be left in grass may be safely adopted as good evidence of what in the opinion of parties was fair and proper management and it is in that light adopted in the Interlocutor.

“*2ndly,* and for the above reasons it seems doubtful if the tenant can have much allowance for his fallow break. In the eye of law he is resileing from his bargain, and therefore is not entitled to the benefits which would result from his complying with it, and if he gives up the farm before expiry of his Lease it seems fair that he should give it up in such a state of management as good husbandry requires. But the Sheriff inclines to hear parties further on this question and on that which follows unless they should be of opinion that a question of this nature would be better discussed before a jury.

"3dly. Nothing is more clear than that a lease being a *bona fide* contract neither party ought to exercise their right in such a manner as wantonly to injure the subjects, or what is the same thing to compell the other party either to sustain a great injury or pay a sum of money to avoid it; On the other hand the landlord cannot challenge any mode of cultivation though it may exhaust the land (which every mode of cultivation does more or less) providing it is one in which the tenant finds a direct interest and fair profit. By attending to these two positions the landlord will at once discover how far it is his interest to crave the continuance of the Interdict as to any of the fields condescended on. The Sheriff cannot suppose in the present case that it will be safe or prudent to desire it, to the very great extent of 180 acres which these parks amount to, and which would leave in grass greatly more than a *third* instead of a *sixth* of the farm. The petitioner will therefore remember that the interdict will be continued *periculo petentis*, and that if the tenant is found ultimately entitled to crop these fields, the value of the last crop will be set against the rent."

"SELKIRK, 26 *March* 1816. — The Sheriff-Depute having resumed consideration of and advised this petition with the Answers Condescendence and answers and whole cause Before answer remits to the Sheriff-Substitute with instructions to nominate two farmers of experience one to be named by either party with a third to be named by the Sheriff-Substitute himself of new to visit the said farm and to report their opinion how far the ploughing of the fields in question fall under the ordinary rules of good husbandry or in other words whether the tenant by this operation may expect a reasonable profit without doing gross and obvious injury to the landlord Allows the visitors to make their report either jointly or separately as they have a mind alleging their reasons for the opinion they shall form and instructs the Sheriff-Substitute to examine the visitors individually and upon oath if it shall be necessary allowing all competent questions to be put by either party and *quoad ultra* adheres to his judgment.

"(Signed) WALTER SCOTT."

"SELKIRK, 15 *April* 1816. — The Sheriff-Depute having considered what is above deponed to, appoints Messrs. Grieve Thorburn and Anderson to be again specially interrogated upon

the question whether the ploughing of the fields in dispute or any of them would in the present state of the farm have been an advisable measure of good husbandry in the event of Mr. Laidlaw continuing in the possession of the farm during the currency of the Lease or whether on the contrary they consider it only as an advantageous operation on the tenants part in the view of removing from it after this crop.

“(Signed) WALTER SCOTT.”

“SELKIRK, 18 *May* 1816.—Having advised this Minute and Answers the Sheriff-Depute before answer allows the examination to proceed with instructions to the Sheriff-Substitute to put all such questions as appear necessary to ascertain whether the Reporter's opinion of the mode of husbandry observed has reference to the ordinary management of the farm or to their considering the present as the tenants last crop But refuses to authorise any special form of interrogating in as much as it does not appear the readiest mode of expiscating the truth.

“(Signed) WALTER SCOTT.”

“SELKIRK, 12 *June* 1816.—The Sheriff-Depute having resumed consideration of this process and advised the same with the reports of the gentlemen referred to Finds upon the whole that Mr. Laidlaw and his Trustees have committed no breach of the tack and have adopted no mode of management which can properly be termed contrary to the rules of good husbandry therefore dismisses Mr. Murray's petition Assoilzies Mr. Laidlaw and his trustees from the claim of damages and decerns But in respect of the desertion of the Lease and the difference of opinion between the other visitors and Mr. Thorburn finds no expense due by either party.

“(Signed) WALTER SCOTT.”

On a reclaiming petition this judgment was pronounced :—

“SELKIRK, 5 *February* 1817.—The Sheriff-Depute having advised this petition and answers in respect that the great number of doubtful and difficult questions which have arisen out of this lease are all occasioned by the tenant's breach of contract and desertion of his Lease (however it may be imputable to innocent misfortune) refuses the prayer of the petition and adheres to the Interlocutor reclaimed against.

“(Signed) WALTER SCOTT.”

Following the above action a minute was presented by the pursuer against the defender for breach of interdict, in respect that he cropped with barley a field ordered by interlocutor of 14th March 1816 to be left in grass. The Sheriff-Substitute awarded this crop in this field to the pursuer toward compensation.

88.

1817.—*Agent and Client : Counter-claim.*

ANDREW LANG, writer, Selkirk, factor for the representatives of the deceased Alexander Park, writer in Selkirk, *against* HELEN FAIRBAIRN, Selkirk.

This was an action for recovery of £12, 13s. The defender lodged a counter-claim.

Both interlocutors were written by Sir Walter Scott.

“SELKIRK, 20 *November* 1816.—The Sheriff-Depute appoints the Defender to condescend on the dates and other particulars of the account founded upon in compensation and to state how she proposes to prove that the same are resting owing.

“(Signed) WALTER SCOTT.”

“SELKIRK, 5th *February* 1817.—The Sheriff-Depute having advised this condescendence Finds it incompetent after the years of prescription have elapsed to lead a proof concerning the alleged outstanding of the sums of £3 and £4, 10s. in respect that, though Mr. Park may once have acknowledged them to be due, it is the statutory presumption that these are paid unless they are proved to be outstanding by writ or oath of party. But respecting the attendance upon the sick cow to save expense in so small a case appoints the trustee for Mr. Park's family to enquire whether such attendance was given and in case he shall find reason to admit the same remits to the Sheriff-Substitute to modify the same accordingly to the medical practice in that department.

“(Signed) WALTER SCOTT.”

Nothing further appears in the process.

89.

1817.—*Lease : Interdict against Third Party : and against Landlord.*

JAMES BROAD, merchant in Selkirk, *against* JOHN PATERSON, writer in Selkirk.

An action to have the defender interdicted against laying down dunghills and setting up stacks in the stackyard, Townhead, Selkirk, of which stackyard the pursuer was tenant under William Ewans, tailor in Selkirk, and to have the said William Ewans interdicted "from giving liberty to any person, not being tenants of his lands, to set up stacks or lay down dunghills in the said stackyard."

The interlocutors sufficiently explain the position of matters. The first was:—

"SELKIRK, 20 *November* 1816. — The Sheriff-Depute having advised this petition, with the whole proceedings, appoints Mr. Paterson to remove the haystack complained of; and respecting the midding stead finds that the petitioner has no interest to complain of the same in respect Mr. Paterson's interest in the subject is anterior to his own; Appoints Mr. Ewans without delay to make such effectual drains round the midding stead as may prevent its being a nuisance to the stackyard, and with this explanation refuses the petition, each party paying their own expenses so far as hitherto incurred.

"(Signed) WALTER SCOTT."

The pursuer appealed, and the following interlocutor was pronounced on his reclaiming petition:—

"SELKIRK, 8 *January* 1817. — The Sheriff-Depute having advised this petition with Answer he refuses the prayer thereof and adheres to his Interlocutor reclaimed against.

"(Signed) WALTER SCOTT."

Again pursuer reclaimed. The following interlocutor was pronounced:—

"SELKIRK, 26 *February* 1817. — The Sheriff-Depute having advised this petition refuses the prayer thereof and adheres to the Interlocutor reclaimed against.

"(Signed) WALTER SCOTT."

Memo.—It will be for the parties to consider before incurring further expense how far an action of removal is competent against a person holding no right from them.

90.

1817.—*Diligence: Poinding for Rent: Interdict.*

HELEN FAIRBAIRN, Selkirk, *against* ROBERT, WILLIAM, and JAMES CHISHOLM, Selkirk.

In an action for rent against Robert Chisholm, the pursuer obtained decree. She poinded and advertised a sale, when two of the defender's sons raised an action of interdict and stopped the sale.

The following interlocutor, written by Sir Walter Scott, was issued:—

“SELKIRK, 12 *March* 1817. — The Sheriff-Substitute having advised with the Sheriff-Depute finds that the poinding of Robert Chisholm's effects was stopd by an interdict obtained by William and James upon an allegation that the poinded goods were their property but which allegation they did not attempt to make good by any proof though full opportunity was afforded for that purpose Finds that the saids William and James Chisholm bought in the said poinded effects (after having retained possession of them for many weeks) at the reduced rate of one pound two shillings and three pence, whereas they were formerly apprized at the rate of nine pounds fifteen shillings and sixpence. Finds that the Defenders are liable in damages as having interrupted the progress of the pursuer's diligence on a ground which they failed, and indeed never attempted, to support by proof. Therefore repells the Defences offered by the Defenders modifies the damages to the sum of £8, 12s. 9d. with the corresponding interest and of £1, 9s. 7d. being the expense of the additional warrant of sale rendered necessary by their interference also finds them liable in expenses of process allows an account to be lodged and Decerns.

“(Signed) CHAS. ERSKINE.”

91.

1817.—*Sale: Action for Price of Goods Supplied: Counter-claim.*

Conjoined actions: JOHN PATERSON, writer in Galashiels, for behoof of the creditors of John Mercer and Helen Martin, vintners in Galashiels, *against* GEORGE HALDANE, in Galashiels (for £29, 10s. 9d.), and the said GEORGE HALDANE *against* the said JOHN MERCER and HELEN MARTIN (for £10, 19s. 10½d.).

The action will be most easily understood by quoting here (out of its chronological sequence) the report dated 25th March 1817 by the Sheriff-Clerk on a remit made to him by the Sheriff's interlocutor of 12th June 1816.

"Mr. Paterson prosecuted Mr. Haldane for an Account of Sundries, chiefly consisting of Hay and Corn for a Horse, amounting to £29, 10s. 9d., deducting always the amount of an account due by Mercer and Martin to Mr. Haldane and concluding for interest from the date of Citation which was 1st June 1812. Mr. Haldane's counter lybel is for an account of £10, 19s. 10½d., the first article of which is a sophia charged at £2, 2s., and for £20 less or more for hay used by the Defenders, belonging to the Pursuer.

"It seems to the Reporter unnecessary to recite the interlocutors in the cause any farther than as they affect the account now to be made up between the parties.

"By Interlocutor of this date 14 July 1813 the Sheriff found Mr. Haldane liable for the keep of his horse in Martin's livery stable, but entitled to credit for such hay as he had furnished, and that whether used for his own horse, or the horses of her other customers—and he sustained Mr. Haldane's account of £10, 19s. 10½d. except for the first Article of £2, 2s. as the price of a sophia which he disallowed. This interlocutor was to the effect of sustaining Mr. Paterson's claim, under these deductions.

"By Interlocutor of this date 12 June 1816 the Sheriff found Mr. Haldane entitled to credit for 100 stones of Hay furnished for his horse, at the rate of 1s. 9d. per stone, and to deduction the rate for hay and corn charged by Mrs. Martin of 16 days during which the horse had been absent from the stable.

"By this Interlocutor the Sheriff 'Remits to the Sheriff Clerk to adjust the balance of accounts between the parties on the principles of this and the former interlocutor' for which purpose the process was lodged with him on 5th February 1817, and the Sheriff Clerk now reports that the following appears to him to be on these principles . . ."

and he brings out that Haldane is due, on a balance, £9, 17s. 10½d., which is given effect to in the final interlocutor.

The several interlocutors in the case (all written by Sir Walter Scott) are these:—

"SELKIRK, 14 *July* 1813.—The Sheriff-Depute having advised this action with the Counter Action at Haldane's instance conjoins the same and finds that the original defender Haldane having put his horse into the stable of a common inn is liable for the keep thereof upon the usual terms of livery stables But finds he is entitled to credit for such quantities of hay as he can instruct having delivered to the pursuer and that whether the same was applied to feeding his own horse or those of her other customers and allows Haldane to prove the amount of the hay so delivered in respect the same is disputed and on the said Counter Action the Sheriff disallows the claim for two guineas for a sofa which is admitted to have been returned but sustains the other articles of charge in the counterlibel reserving to Helen Martin or her assignees to take Haldane's oath on the value of the victuals furnished 20 May 1811 in respect they were alleged to be overcharged. Also reserves to Haldane to take Helen Martin's oath if he is so advised upon the number of feeds of corn charged as given to his horse.

“(Signed) WALTER SCOTT.”

"SELKIRK, 30 *March* 1814.—The Sheriff-Substitute having advised with the Sheriff-Depute Finds George Haldane entitled to deduction from the account pursued for for all such days as his horse did not stand in the stable of Helen Martin as well for four days admitted by the Pursuer as for any greater number on which he can prove his being absent Allows him a proof that the horse was absent during three weeks after 11 July 1811 and Mrs. Helen Martin a counter proof as accords.

“(Signed) CHA. ERSKINE.”

"SELKIRK, 12 *June* 1816.—The Sheriff-Depute having advised this proof finds it proven that Mr. Haldane found his horse in hay to the extent of at least one hundred stone Allows him credit in accounting with Mrs. Martin for the said hay at the rate of twenty one pence per stone which will leave about three pence per day for the stance of the horse as well as the profit on the corn Finds that the Defender Haldane has proved that the horse was absent for about eight days in the Autumn of 1811 and stood for eight days more in another livery stable and that he is entitled to deduction for the said sixteen days at the rate charged for hay and corn in Mrs. Helen Martin's account and *quoad ultra* Adheres to the

former Interlocutor and Decerns and remits to the Sheriff-Clerk to adjust the balance of accounts between the parties on the principles of this and the former Interlqr.

“(Signed) WALTER SCOTT.”

At this stage a reclaiming petition was presented by Mr. Haldane, on which the Sheriff's interlocutor was:—

“SELKIRK, 21 *August* 1816.—The Sheriff having advised this petition and answers in respect the Interlocutor proceeds upon a proof in which full time was allowed to both parties to examine what evidence they judged proper refuses the prayer of the Petition and Adheres to the said Interloqutor reclaimed against.

“(Signed) WALTER SCOTT.”

The Sheriff-Clerk's report having been made, this interlocutor was pronounced:—

“SELKIRK, 11 *June* 1817.—The Sheriff-Substitute having advised with the Sheriff-Depute Finds the Defender liable in the sum of Nine pounds seventeen shillings and ten pence halfpenny sterling in terms of the preceding report with interest on the said sum from the first day of June Eighteen hundred and twelve years But finds no expenses due to either party except the expense of extract.

“(Signed) CHA. ERSKINE.”

92.

1817.—*Road: Act: Right to take Materials for Repair of Road.*

WALTER BRYDON, tenant in Mountbenger Knowe, *against* JOHN LAIDLAW, Philiphaughmill, and JOHN GORDON, Catslackknowe, roadmen.

An action to have the defenders interdicted from opening a quarry on pursuer's farm or gathering stones from the surface of his grounds for the purpose of repairing the road.

“SELKIRK, 24 *August* 1816.—The Sheriff-Depute having considered this petition with the Answers replies and whole process finds that the Respondents have acted unwarrantably in opening a quarry or collecting stones on the farm of the petitioner without having obtained his private consent to do so or having proceeded by giving due premonition in terms of the Statute.¹ Therefore

¹ *I.e.* “An Act for Levying conversion money in lieu of Statute Labour, and otherwise regulating, making, etc., the High Roads in the County of Selkirk.” 1801, sect. 31.

grants the Interdict prayed for and before answer as to the damages claimed appoints the petitioner to lodge a Condescendence as to the amount of loss which he has sustained and the defenders to see and answer the same. Reserving always to the Trustees of the roads and their overseer to proceed as directed by the Statute in case they find it necessary to collect materials from the farm of the petitioner to repair the road.

“(Signed) WALTER SCOTT.”

The pursuer pleaded that he is entitled to damages in respect he having let the building of his dykes to certain tradesmen they demanded more per rood in respect the stones they intended to use were carried away by the defenders, and the following interlocutor was issued:—

“SELKIRK, 20 *August* 1817.—The Sheriff-Depute modifies the damages pursued for to the sum of six pence per rood on the dykes which he contracted for being what was extrajudicially offered by the defenders and finds the same amounts to three pounds five shillings sterling with One pound ten shillings sterling more in name of damages for the loading of the stones and Decerns, but in respect of the *bona fides* of the Defenders, their willingness to settle out of Court and the formal nature of the objection to their proceedings finds no expenses due except the expense of Extract.

“(Signed) WALTER SCOTT.”

93.

1817.—*Cautionary Obligation: Prescription.*

GEORGE NICHOL, in Glendinning, *against* GEORGE GRIEVE, in Midshaw, and Others; and also *against* ANDREW HENDERSON, writer in Selkirk.

This was an action for the sum contained in a bill signed by the other defenders, and also signed by Mr. Henderson as cautioner.¹ Henderson stated that he signed the bill as cautioner for the acceptors on 17th May 1810, over seven years before, and that therefore his obligation had prescribed.

Sir Walter Scott's judgment is contained in the following interlocutor:—

“SELKIRK, 20 *August* 1817.—The Sheriff-Depute having advised

¹ Guarantor.

this Summons with defences and whole cause finds that the anomalous mode of constituting a cautionary obligation by adhibiting the name of a person who is neither drawer acceptor nor indorser of the bill on which his name stands as Cautioner is in itself altogether irregular. But farther supposing the Defender's liability as Cautioner had been regularly established by a separate bond or letter guaranteeing the bill finds that it was the duty of the holder if he meant to preserve recourse against the cautioner to have discussed the principal debtors within the years of prescription and while the document which the Defender is supposed to have guaranteed possessed the privileges assigned to it by law. Therefore Assolzie the Defender from the conclusions of this Action and Decerns, Finds him entitled to expenses and allows an Account thereof to be lodged.

“(Signed) WALTER SCOTT.”

94.

1817.—*Obligation: Agreement to Subscribe to Masonic Lodge.*

GEORGE YOUNG, saddler in Selkirk, AND OTHERS, *against* EBENEZER CLARKSON, surgeon in Selkirk.

This was an action to recover £10, being the price of two shares subscribed by defender towards building a masonic lodge in Selkirk.

The circumstances and judgment are set forth at p. 61.

95.

1817.—*Hiring: Action for Work Done.*

JAMES LEITCH, wright at Lindean Mill, *against* ROBERT HENDERSON, writer in Selkirk, treasurer of a committee appointed at Selkirk to search for coal around the adjacent county.

This was an action for payment for work done.

The judgment is set forth at p. 62.

96.

1817.—*Charge of Harbouring Vagrants.*

THE PROCURATOR-FISCAL OF COURT *against* JOHN STEWART and WILLIAM FAIRGRIEVE, both of Galashiels.

A criminal charge of harbouring beggars.

The circumstances and judgment are set out at p. 98.

97.

1817.—*Lease: Hypothec: Sequestration for Rent.*

GEORGE MERCER, AND OTHERS, tacksmen¹ of Selkirk South Common, *against* WALTER SCOTT, South Common.

A petition for sequestration for rent.

Sir Walter Scott pronounced the following judgment, written on the Condescendence, half of the second sheet of which had been cut out:—

“SELKIRK, 8 *January* 1817.—The Sheriff having advised the proof and whole process, refuses the petition for sequestration and authorizes the Clerk of Court to deliver up to the Respondent Walter Scott, the two pounds of rent, consigned in his hands, in name of damages, and in compensation of the petitioners' claim for rent, finds the petitioners liable in expenses, and allows an account thereof to be given in.

“(Signed) WALTER SCOTT.”

“See Memorandum on the preceding page.”

The “Memorandum” referred to, also in Sir Walter's handwriting, is in these terms:—

“The Sheriff observes a part of this paper has been cut off; this is highly inaccurate, by whatever accident it may have occurred, and leads to insecurity in the State of processes, interlocutors, etc., before the Court. The Sheriff will impose a severe fine when another instance of this kind shall occur.”

98.

1818.—*Poor: Relief: Decision of Kirk-Session.*

(Poor) ELIZABETH INGLIS, Borthwickshiels, *against* THE KIRK-SESSION AND HERITORS OF THE PARISH OF ROBERTON.

An action for parochial relief.

The circumstances and judgment are set forth at p. 89.

¹ Lessees or tenants.

99.

1819.—*Lease: Rent: Counter-Claim on Account of Inaccurate Measurement of Farm.*

JOHN CORSE SCOTT, of Sinton, *against* ROBERT and PETER DICKSON, tenants in Dimpleknowe.

A summons, containing warrant for arrestment, for recovery of arrears of rent; counter-claim in respect of inaccurate representation as to the acreage of the farm.

The tenants under the lease became bound to pay £200 per annum for the first seven years, and £250 for the last seven years of the lease; they also became bound to deliver yearly four carts of Lothian coals containing 16 cwt. each, and eighteen kain hens. Some years after entry, by agreement, the rent was reduced to £160. It was alleged by the pursuer that this reduction was made conditionally on the tenants paying up £100 of arrears; and the tenants having failed to pay up the arrears, the pursuer had right to the original rent and claimed £849, 10s. 8½d. of arrears and interest. The defenders raised a counter-libel stating that the rent was fixed on the statement that the farm consisted of 250 acres—the rate per acre being fixed at 16s.—whereas it only contained 234 acres; and they craved decree for £123, 10s. 4d. overpaid and £500 damages. The case is a long one. Petitions, defences, answers, and replies to the number of sixty-six are in process. The proceedings extended over five years. The following interlocutors were pronounced (all are in Sir Walter Scott's handwriting):—

“SELKIRK, 2 *March* 1814.—The Sheriff-Substitute having advised with the Sheriff-Depute and having advised the process with the Minute and Answers finds that if the Defenders mean to challenge the extent of the measurement agreed to by themselves they must produce evidence in support of such challenge at their own expense and appoints them to lodge special Defences *in causa* if they any have against next court day under certification that the Sheriff will otherwise decern in terms of the libel.

“(Signed) CHA. ERSKINE.”

“SELKIRK, 22 *March* 1815.—The Sheriff-Depute having resumed consideration of this Summons with the counter Summons at the instance of Messrs. Dicksons', Defences, Answers, Minutes and productions and whole process in both actions Conjoins the two actions and in the original action at Mr. Scott of Sinton's instance finds,

1st that by the Renunciation executed and accepted in November 1811 the original lease was by the agreement of both parties finally discharged and abandoned and that although the subsequent agreement appears to have been a fair and liberal one on the part of the landlord yet it does not seem a necessary consequence nor is it provided in the agreement as such that upon a failure on the tenants' part to implement the prestations incumbent upon them by that later agreement the obligations of the old lease should be thereby revived against them in the shape of penalty. And therefore finds after Whitsunday 1812 the landlord is only entitled to charge the rent of One hundred and sixty pounds yearly as provided by the new bargain. 2ndly. Respecting the exceptions taken to the various sums charged for the tenants share of public burdens the interest due for repairs and improvements upon buildings, premiums on insurance, etc., the Sheriff finds that these charges were admitted by the tenants in their docquetted accounts with their landlord and that they cannot now be admitted to challenge the same unless upon an allegation of specific error supported by the necessary proof which their previous acquiescence throws upon them. 3rdly. Before Answer as to the Counter action directs a re-measurement of the farm as now possessed by the Messrs. Dicksons to be executed jointly by Messrs. T. Kinghorn and Watson that the real extent thereof may be ascertained reserving consideration upon which party the expense shall ultimately fall and appointing the same in the interim to be paid mutually and appoints the pursuer Mr. Scott or his steward to point out to the Land Measurers the portions of land laid off from other farms into that of Dimpleknowe which are stated to have enlarged the extent thereof from 233 acres as expressed in the measurement of Mr. Kinghorn in 1802 to 250 acres the extent stated in the lease between the parties and directs the measurers to report *quam primum* in order that a state of accounts between the parties may be made up and adjusted at sight of the Sheriff. Conjoins also the additional summons at Mr. Scott's instance defences etc., with the proceedings above mentioned and therein finds that the tenants are only liable in over rent for such parts of the land occupied by crop 1813 being their away going crop as were sown up with grass seeds by the Landlord or incoming tenant and were pastured by them after the separation of that crop from the ground. And for clearing up the

facts upon that point appoints the pursuer Mr. Scott to lodge condescendence stating the extent of the grounds so sown upon by him or his incoming tenant and so pastured by the Messrs. Dicksons, Finds the tenants liable in payment of the half years rent due at Martinmas 1813 being £80 sterling in terms of the new bargain with interest of the money laid out on houses, value of kain poultry, etc., as libelled and decerns therefor.

“(Signed) WALTER SCOTT.”

Mr. Scott lodged a reclaiming petition on which this interlocutor was pronounced:—

“SELKIRK, 1 *November* 1815.—The Sheriff having considered this petition and Answers, refuses the prayer of the petition, and adheres to his interlocutors reclaimed against.

“(Signed) WALTER SCOTT.”

The pursuer presented a second petition.

“SELKIRK, 5th *February* 1817.—The Sheriff having advised this petition appoints the same and the answers to be withdrawn as unnecessary and as containing no appeal against the judgment of the Court.

“(Signed) WALTER SCOTT.”

“*Note*.—The Sheriff appoints the petition to be withdrawn as unnecessary because there could not be any room for considering this as a case of character and because in the circumstances of the case there cannot be reason to suppose that Mr. Scott conceived the idea of passing off his farm far more extensive by 15 acres than it really was. A certain latitude must be allowed for pleading in a court of justice, which cannot be always narrowed within the strictest bounds. All questions of this nature must be pleaded as questions of fraud that is not fraud in the ordinary sense but legal or constructive fraud which has no more connection with what is usually called so in common language than a person being put to the horn has with actual treason or rebellion. The Sheriff having stated this on the one side recommends to parties and their agents in all cases to plead their points with moderation and decorum as the contrary always hurts the client.

“(Intd.) W. S.”¹

¹ As to this note, see *supra*, p. 90.

"SELKIRK, 21 *January* 1818.—The Sheriff-Depute having advised this Minute and Answers. 1st. Disallows the various articles stated as repairs of Dykes and houses amounting to £8, 12s. 2d. not falling under the landlord's hypothec. 2ndly. In respect the respondents have never brought forward evidence to show that the sum charged for the straw of crop 1814 is over calculated, though two years have elapsed since they were allowed an opportunity of doing so finds the same correctly stated at £50, 8s. 3rdly. Disallows the sum of Expense incurred by the landlord in combating the claim of Eccles reserving his right to recover the same from Eccles himself. 4thly. Appoints the Clerk of Court to lodge a state of the arrears so far as received and of the means he has taken to make the balance effectual against the Debtors. And, lastly, in respect of the various points litigated between the parties modifies the account of Expenses to Twelve pounds twelve shillings with expense of Extract under which deduction the Sheriff sustains the claim as lodged and remits to the Sheriff-Substitute to decern for the ascertained balance.

“(Signed) WALTER SCOTT.” .

"SELKIRK, 25 *March* 1818.—The Sheriff-Depute having advised this state approves thereof so far as the same states the deductions to be allowed by the tenants on account of short measurements with the corresponding interest to amount to the sum of £129, 16s. 11½d. But in respect the Messrs. Dicksons, though great time has been allowed for that purpose have not (made) any specific allegations as to other alleged over charges the Sheriff-Depute remits to the Sheriff-Substitute to decern finally in the cause on the principle of the Interlocutors already pronounced and to find expenses due to neither party.

“(Signed) WALTER SCOTT.”

"SELKIRK, 27 *May* 1818.—The Sheriff-Depute in respect of the full time allowed to the petitioners to prove their allegations Refuses the prayer of the present petition under the provision however that if the petitioners choose to hold the same as a condescendence and abide by the risque of being subjected to full expenses of process in case of failing to make it good by evidence he will recal his interlocutor and allow the proof prayed for. Supersedes Extract for a fortnight that they may consider whether

it is for their interest to abide this alternative and appoints them to subscribe their consent to hold the petition as a condescendence if they are minded to do so with their own hands. And in case of their doing so directs that the Sheriff-Substitute shall pronounce an order that that petition may be seen and answered in point of fact as a condescendence.

“(Signed) WALTER SCOTT.”

“SELKIRK, 20 *January* 1819.—The Sheriff-Substitute having advised with the Sheriff-Depute and having considered this petition held as a condescendence with Minutes and Answers in respect the statement as now made up by Mr. Scott and vouched by an Extract from his books covering the expense of the buildings at Dimpleknowe corresponds with the charge acquiesced in upon the 5 November 1811 by a formal docquet signed by the parties finds it incompetent to allow the proof prayed for Finds the charge for expenses as stated in No. 50 being £3, 13s. 4d. is duly charged and vouched and Decerns for the sum pursued for under the deductions ascertained by former Interlocutors and finds the Messrs. Dickson liable in all expenses subsequent to the date of the Interlocutor reclaimed against.

“(Sgd.) CHA. ERSKINE.”

100.

1819.—*Application for Warrant: in Meditatione fugæ.*

JEAN HAMILTON CRAWFORD, residing in Edinburgh, daughter of James Crawford, Excise officer in Melrose, *against* WILLIAM SANDILANDS, labourer, Philiphaugh.

A petition for a warrant to imprison the defender in respect he was *in meditatione fugæ* (see *supra*, p. 76). The application came before the Sheriff-Substitute. He granted “Authority to Walter Scott, Esq., Sheriff-Depute of the Shire to take the petitioner’s evidence on commission.” Scott’s report of the execution of the commission, made to the Sheriff-Substitute, is as follows:—

“EDINBURGH, 22 *January* 1819.—Compeared before me Commissioner appointed by the Sheriff-Substitute of Selkirkshire the above designed Jean Hamilton Crawford petitioner who being duly sworn Depones: that on the thirteenth day of August last William Sandilands within designed told the Deponent that he

intended to leave this country and go to America and that he would take the Deponent with him and marry her—that since that period he has denied to the Deponent's father that ever he had any connection with her and that the Deponent's father has written both to the Deponent's present master Mr. James Watson, Supervisor of Excise and also to the Deponent (interlocutor badly torn here) . . . to go to America. And from what Sandilands told her and what she has since heard from her father she says upon her oath that she verily believes it is the purpose of the said William Sandilands to leave the Kingdom of Scotland and go to America without doing justice to her claim against him.

“(Signed) JEAN HAMILTON CRAWFORD.

“All which is reported by me.

“(Signed) WALTER SCOTT.”

101.

1819.—*Poaching Case.*

THOMAS HUTSON, gamekeeper at Shielshaugh to the Duke of Buccleuch, with concurrence of the Procurator-Fiscal, *against* JOHN RODGER, herd in Oakwood.

A charge of contravening “An Act for preserving the Game” (25th March), 1707, cap. 13.

The circumstances and judgment are fully set forth at p. 93.

102.

1819.—*Affiliation and Aliment.*

AGNES DUNLOP, Selkirk, *against* ROBERT THORBURN, tenant in Sunderland.

This was an action for the aliment of two illegitimate children. Decree in absence was granted; but the defender reclaimed, stating that he was from home when the summons called. He produced a receipt showing that the pursuer received aliment for the children from another man. This the pursuer admitted, but she stated that the other man was a cousin of the defender, and that the aliment was paid by the defender through this other man to conceal the matter, the defender being a married man.

The following was the judgment:—

"(Signed) WALTER SCOTT."

1819.—*Declinature of Jurisdiction.*

Action for rent.

104.

THE REVEREND WILLIAM ELDER, minister of the Associated Congregation, Newtown, and others, trustees for the creditors of the deceased William Rodger, manufacturer in Selkirk, *against* GEORGE RODGER. Writer in Selkirk (brother of the said William Rodger).

By submission by the parties, dated 31st October 1814, the matters in dispute were referred to the amicable decision of Walter Scott, Esq., of Abbotsford, Sheriff-Depute of Selkirkshire, and Charles Erskine, Esq., writer, Melrose, the Sheriff-Substitute.

“ We the Arbiters within named hereby accept of the foregoing Submission and prorogate the same to the _____ day of _____ next. Nominate James Curle, Writer in Melrose to be our Clerk. In Witness Whereof we have subscribed these presents wrote upon the back of this Submission by the before designed Chas. Erskine, at Abbotsford the Twenty second day of _____ 18____

July Eighteen hundred and fifteen year Before these witnesses
John M'Beith and George Waynes, Servants at Abbotsford.

“(Signed) WALTER SCOTT.

“CHA. ERSKINE.”

Nearly four years later Sir Walter Scott (alone, not jointly with his co-arbiter) issued this elaborate interlocutor:—

“SELKIRK, 28 *April* 1819.—The Sheriff-Depute having advised this complicated process with all the documents produced, 1st. Remits Mr. George Rodger's account of business and charges for trouble in his brothers affairs with the objections thereto to the Sheriff-Substitute to consider the same and sustain or repel the said objections as he shall see cause. 2dly. In respect that it does not appear either *ex facie* of the bill for £150 dated 25 March 1799 or from any supplemental evidence whatsoever that the said bill was retired by George Rodger Finds he is not entitled to found upon the mere possession of that retired document so as to rear the same up into a claim against the estate of the deceased and disallows such claim accordingly. 3dly. With reference to the various sums comprising the sum of £210 stated against George Rodger on p. 3 of State No. 2 of process; the Sheriff finds the claim for No. 1 being £40 sufficiently instructed by the letter produced and that George Rodger has failed to show that the same was paid therefore sustains that item of charge Disallows the claim No. 2 being £1 which does not appear sufficiently vouched. Sustains the claim against George Rodger No. 3 for £40 in respect he admits having received the same and fails to show how or when it was repaid. Disallows the claims for Nos. 4, 5, 6 & 7 being the sums of £5, 5s., £1, 9s., £5 and £5, 1s. of which no satisfactory vouchers are produced reserving to the trustees the benefit of George Rodger's oath *ad litem* on these and other sums disallowed in this interlocutor Sustains the claim No. 8 for £10 also the claim No. 9 for £15, 5s. as sufficiently vouched without any proof and payment being offered Disallows No. 10 claim for £5 as departed from by the claimants. Sustains the claim No. 11 for £50 the receipt of which by George Rodger from Mr. Currer is sufficiently proved by George's letter of 18 November 1801 while he shews no evidence that it was paid over to his brother. Sustains the claim No. 12 for £4, 19s. of which the said George

Rodger admits the receipt but fails to show that the same was paid or compensated otherwise than by his business account which is elsewhere charged at full. Disallows the claim No. 13 for £2, 1s. as price of half a barrel of gin in respect George Rodger denies the same and no voucher is produced. Disallows for the same reasons Claims No. 14 and 15 for the trifling sums of 2s. 6d. and 4s. 4thly. Upon the Second branch of these accounts Finds in terms of Mr. Bell's very sound opinion that George Rodger was entitled to full payment of the privileged debt of £53 laid out by him after his brother's death without reference to the present claims against him. Farther that the sum found ultimately due by George Rodger to his brother's estate and creditors should be set off against the full amount of the bills held by Prilseid and Mercer for which he settled as cautioner therein by payment or security and that he is entitled to rank as a creditor for dividend on the balance if any shall arise. 5thly. Having considered the Counter action, defences, and Answers respecting the damages claimed by George Rodger for giving up the four acres and odds of the land of Batts finds that there was no existing or formal lease between the parties on which George could have maintained possession against his brother's creditors and that if he meant to keep such a claim open he should have explicitly stated the same before ceding possession. Therefore assoilzies the Trustees of William Rodger from the said Counter action and Decerns. And in the original action appoints a state to be made up so soon as the Sheriff-Substitute shall have adjusted the account for business and trouble that decree may go out in terms of this interlocutor.

“(Signed) WALTER SCOTT.”

Note.—“The Sheriff will be obliged to parties to point out any thing he may have omitted in this confused case and he requires parties in further pleadings to preserve their temper towards each other. Mr. George Rodger will observe it is not the fault, but the misfortune of the Trustees, that they cannot throw perfect light on matters which the manner in which these affairs have been conducted have left particularly involved and obscure.”

The final interlocutor also is in Sir Walter's handwriting:—

“SELKIRK, 28 *June* 1820. — The Sheriff-Substitute having

advised with the Sheriff-Depute Modifies the sum due by Mr. Rodger including Interest to the sum of One hundred and five pounds Sterling with interest from this date and decerns for the aforesaid sum of accumulated principal and Interest.

“(Signed) CHA. ERSKINE.”

105.

1820.—*Servitude: Right to Cast Feal and Divot.*

THE MAGISTRATES OF SELKIRK *against* JOHN ANDERSON, tanner in Selkirk.

This was an action to have the defender interdicted from casting feal and divot for coping dykes.

The circumstances and judgments are set forth at p. 101.

106.

1821.—*Petition to Sell Articles Deposited in Security of Debt.*

THOMAS STODDART, merchant in Selkirk, Petitioner.

This was a petition for warrant to sell articles left in satisfaction of a debt.

The circumstances and judgment are set forth at p. 99.

107.

1821.—*Sale: Lambs: Action for Price.*

WALTER CUNNINGHAM, Catslackburn, *against* JAMES HOGG,¹ Eltrieve Lake.

This was an action for payment of £31, 17s. 10d., the price of lambs, etc., as stated in following “State of Debt” produced with the summons:—

1807.

July 18. Entered into an Agreement to send lambs to Mr. Hogg to Graze and to pay him 6s. 6d. for each sheep if delivered back, and on the other hand he to pay 7s. 6d. as the price of each sheep not redelivered.

Sent him 6 scores 19 lambs

1808. of which 4 score 4 not delivered back at 7s. 6d. each

£31 10 0

Carry forward

£31 10 0

¹ “The Ettrick Shepherd”

1808,	Brought forward . . .	£31 10 0	
	Deduct Grass for 2-17 received back at 6s. 6d. . .	17 17 6	
	Balance due Mr. Cunningham . .	£13 12 6	
	Paid for part of these Hoggs received back having to purchase them at a sale at the instance of Mr. Hogg's Creditors	1 5 0	
		£14 17 6	
£15 10 6	Only 2 scores 15 lambs got back therefore add 13s. deduct as grass Mail for the other two by mistake.		
1807.			
Nov.	Advanced for Grass Mail at smearing time in consequence of Mr. Hogg's letter.		
	To Andrew Laidlaw p. order . .	£7 0 0	
	„ Thomas Hogg, Ettrickhall, sum due by Mr. James Hogg to him for articles at Ettrick- hall roup	14 0 0	
		21 0 0	
		£35 17 6	
	The above sum Mr. Hogg falls to pay back in consequence of Hoggs having been kept as already stated to considerably more than the amount of the Grass mail of those returned— with interest from the date of the advance.		
	Interest of £21 from November 1807 to 6 July 1816—8½ years . .	£8 18 6	
	Interest of £14, 17s. 6d. Balance of price of Lambs from Whitsunday 1808 when they ought to have been delivered to July 1816— 8 years	5 19 0	
1816.			
July 6.	Paid to account	5 0 0	
		£30 17 6	
	Interest of balance to 24th May 1817, 322 days	1 7 2	
1817.			
May 24.	Paid to account	5 0 0	
		£25 17 6	
	Interest of balance to 10th April 1818—321 days	1 2 7	
1818.			
April 10.	Paid to account	10 4 0	
		£15 13 6	
	Carry forward . .	£15 13 6	

		Brought forward	£15 13 6
	Interest of balance to 15th June		
	—66 days	£0 2 9	
June 15.	Paid to account		1 0 0
			£14 13 6
	Interest of balance to 10th Decem- ber—178 days	0 7 6	
Dec. 10.	Paid to account		2 0 0
			£12 13 6
	Interest of balance to 3rd February 1821—2 years, 55 days	1 6 10	
	Add Interest		19 4 4
			<u>£31 17 10</u>

DEFENCES FOR JAMES HOGG.

“Far as it is from the Defender’s inclination to with-hold from any man what is justly his own, yet he cannot allow himself silently to submit to charges or claims which have no just foundation or existence whatever: The Defender in this case is prosecuted for payment of no less a sum than £31, 17s. 10d. as per state produced with the summons and referred to, embracing transactions which by said State appear to Have originated as far back as *July 1807*. In defence the defender might have contented himself without farther comment or observation by merely stating that *he does not owe* the Pursuer a single farthing of the debt sued for, leaving the Pursuer to substantiate his Claim by other documents than any he has yet exhibited, but he having produced some correspondence or letters from the Defender in regard to the now subject matter of dispute, the import of which cannot well be understood by your Lordships without explanation, the Defender therefore in the first place begs leave to submit the following particulars.

It is not denied that in the *year 1807* the parties to the present action had some transactions in regard to grazing of sheep, of which the Defender now at this distance of time remembers nothing, save that both were losers to a certain amount, each having borne their share of the loss, and then and there the matter remained. About *seven years afterwards* however, vizt. in the end of 1813, or beginning of the year 1814 and that for the first time, the Pursuer thought proper to urge a claim on that score which not a little astonished the Defender, and the matter had then nearly become the subject of legal discussion, the Defender having employed an Agent in Edinburgh to investigate the

nature of the claim and to attend to his interest in the matter, but the Pursuer not thinking himself justified in urging such a claim, very wisely did not try the fate of a lawsuit, and thus the affair terminated. At the same time however it may be proper to state for connection's sake, that the claim thus made was stated by the Pursuer at a gross sum of about £7, 13s., without exhibiting to the Defender any particular account of the transaction. Some time after this period when the Defender came to the Country, he had occasion to call on Mr. Cunningham the foresaid Pursuer, and amongst other topics the subject of the claim already mentioned was introduced, and before the parties separated it was arranged, and the Pursuer positively agreed, that if the Defender Mr. Hogg would pay him £21 on account of cash he the pursuer had formerly advanced for the Defender, he would make no farther claim on him, and would take that sum as the Defender could conveniently advance it. This is a fact which the Pursuer will not deny; but should he do so, the Defender undertakes to prove the same by his Oath. This arrangement took place in the year 1813, and in consequence on 5th February 1814 the Defender wrote the Pursuer as follows:—‘After consulting with my friends I have resolved to comply with your demands namely, that on giving me a free discharge at present I shall consider myself bound afterwards to make up to you the £21 complete,’ and accordingly the Defender did remit that sum by instalments, and something more as a gratuity for interest, on account of the Pursuer having lain long out of his money. This is instructed by the Pursuers own State No. 8 of process. The Pursuer has however to serve his own ends commenced his claim with the State of a transaction about which the Defender knows nothing, for in point of fact, until the present action made its appearance he never saw such a State, or even heard that the Pursuer held or had ever produced such a document to any one. He had indeed as already noticed been told that the Pursuer claimed about £7, 13s. as loss on a grazing transaction; but this the Defender never would listen to, and which moreover was given up, if any such claim had really existed, in a subsequent arrangement between the parties, when the Pursuer agreed to accept £21 in full of all demands.

“The Defences against the Action are therefore the following, 1st, That the Defender owes the Pursuer no part of the sum of £14, 17s. 6d. which forms the first branch of his State, and 2dly, That the sum of £21 which forms the second branch of his claim has

been fully paid and compensated, and therefore now owes him nothing.

“The Defender therefore craves to be assoilzied from the action with Expenses. Under Protestation to add and Eik.

“(Signed) ROBT. HENDERSON pr.

“Mandate.”

ANSWERS FOR WALTER CUNNINGHAM.

“Whatever may be the Defender’s inclination, it is certain he is withholding from the Pursuer what is justly his own. The Pursuer has produced vouchers to instruct his whole claim, and it is not enough for the Defender now to say that he owes the Pursuer nothing, unless he can prove his assertion by showing how the debt constituted by the vouchers in Process has been wiped off, which he has yet failed to do—nay he has not made a single allegation of any payment being made other than what are credited in the State libelled on. Indeed there is neither Rhyme nor Reason in the whole defences, and one or both might have been expected. Indeed the only defence he seems to make, is that the claim originated as far back as 1807. Now it may be asked who is to blame in allowing it to lye so long over?—certainly not the Creditor, but the debtor. It is to his shame and not to the Pursuer’s, that the latter has lain so long out of his money, that the Defender now remembers nothing. But in the true spirit of gratitude, for the favour of the money at first; and for the time allowed for paying it back, the Defender denies it, because the debt originated in 1807 and he now remembers nothing—and yet this is the man who writes his own life and seems to remember every thing.

“Had the Defender contented himself with pleading prescription, the Pursuer would have understood him, and would have established the debt by writ or oath of the debtor. But he does not deny the debt, but only tells your Lordship that ‘he might have contented himself by merely stating that he does not owe the Pursuer a single farthing.’ But that this might not be constructed into an express denial, he softens the expression, and ‘now at this distance of time remembers nothing.’

“But the Mountain Bard seems to have a very accommodating memory, and can either remember or forget at pleasure. Compare his now memory with his letter No. 5 of productions, on the envelope of which his agent has put as the date 18 February 1814, for whether

it be the custom of poets or not, the Pursuer cannot say, but the Defender seems to have a trick of omitting the year of God in the dates of his letters: 'I lifted £10 yesterday and intended sending you the half of it with the carrier, but when I received yours talking about sending you £20, and giving me time for the rest I am determined to send you no more till I learn the extent of your proposed claim, as I did not conceive I owed you £20 by at least 5. If you are going to make such claims as that on me remember I am not owing you a sixpence, and I care not for any diligence you can use I remain, Sir, Yours etc.' The concluding sentence of the letter, certainly outstrips all poetical license, could only be the effort 'of a strong mind and vigorous imagination,' and could never be allowed to an ordinary shepherd—'Remember!!! altho' I intended sending you a payment, and altho' I conceived I owed you £15, I can at pleasure forget, and say "I am not owing you a sixpence." The still small voice I do not regard; and I care not for any diligence you can use.' Honest man!! This letter would make a valuable addition to a memoir of the life of James Hogg; and upon a 'retrospect' the Pursuer should like to know if Mr. Hogg could view it with 'self complacency.'

"About the year 1807, the Defender had become a great farmer, but as is acknowledged in his memoir, he had not capital nearly sufficient for the undertaking. He was glad therefore to get stock to graze from others, and as appears from his letter of 18 July 1807 he received from the Pursuer 139 Lambs which he obliged himself to graze until Whitsunday 1808, at the rate of 6s. 6d. per sheep, and to pay 7s. 6d. for every one which he should not return besides smearing them at his own expense—and as appears from his other letter of 17th November 1807 he says, 'It is customary for those who graze sheep by the year, to get full mail at Martinmas for all that are smeared, but as he had to account for the dead,' he adds 'that he would not ask above the half of it.' In this way he got from the Pursuer £21 which is acknowledged by the Defences.

"If he had restored all the sheep the Pursuer would have owed him the balance of grass mail; but for whatever sheep were not returned the Pursuer was on the other hand entitled to payment at the rate of 7s. 6d. each; and the letters instruct that the Pursuer had nothing to do with any loss on the sheep which was to fall on the Defender solely.

Accordingly, in the State libelled on, the grass mail is allowed for such as were returned, and the price of such as were not returned is

charged against the Defender together with the £21 advanced to him, which leaves the balance as claimed by the Pursuer. In the Memoir of the Defender's life given in the third edition of the *Mountain Bard*, page xxix., he says, 'Finding myself at length fairly run aground I gave my creditors all that I had, or rather suffered them to take it and came off and left them. I never asked any settlement, which would not have been refused me: and severely have I smarted for that neglect since.' This was exactly the case. The Defender walked off, leaving the Pursuer to bear the loss of his £21 and of 4 scores and 4 of his sheep under deduction only of £17, 17s. 6d. as the grass mail of 2 scores and 17 sheep which he succeeded in recovering; and as stated in the Defences then and there the matter remained, until the end of 1813 or beginning of 1814, when the Defender having become more wealthy, the Pursuer began to urge his claim, which had lain dormant for some years; but whether the Defender then employed an Agent in Edinburgh to investigate the matter or not, the Pursuer cannot say, as no legal steps were taken or offered to be taken until the present process commenced, when the Pursuer had become poor and unable to lye longer out of his money, and the other party rich and able to pay it. But to belye the Defender's statement that the claim was in 1813 or 1814 stated by the Pursuer at a gross sum of about £7, 13s., it is only necessary to refer Your Lordships to the Defender's letter of 5 February 1814 where he says: 'After consulting with my friends I have resolved to comply with your demand, namely that on giving me a free discharge at present I shall consider myself bound afterwards to make up to you the £21 compleat *over and above your share* of the loss in sheep and this I bind myself to do trusting to your honour not to mention it publicly nor harass me for the money.' This letter also belyes the assertion that the Defender never asked any settlement from his Creditors. This letter also shows what little reliance is to be placed on the Defender's denials, for if his own agent is right in the date to the letter first quoted, the Defender has, within 13 days of the date of this letter acknowledging £21 over and above the loss in sheep, denied that he owed more than £15—and even threatened to deny the whole—'Remember,' says he, 'I do not owe you a sixpence.'

"But this letter does more. It completely and distinctly proves the whole debt. No doubt one expression—'your share of the loss in sheep'—at first sight may be a little doubtful, but is explained by what follows. The Defender had proposed to pay a composition of

10s. p. pound and the Pursuer had agreed to accept that Composition on his claim for the sheep not returned, provided he was paid the £21 in full with interest, and this composition is what is meant by the word 'share.' Accordingly the letter goes on to request the Pursuer 'In the meantime be so kind as send orders to some one here to sign your acceptance of the terms and security offered on which you will get a Bill or line for the moiety.' But the Pursuer declined to sign any such collusive discharge which would have put it entirely in the will of the Defender afterwards either to pay up the £21 or not, as his honour, who can say, 'Remember I am not owing you a sixpence, and I care not for diligence' should dictate; and thus the arrangement was broken off.

"The letters of 1807 shew that the Defender got 139 sheep which he was to return, or to pay for those he did not return. The Defences in this Action, shew that he got £21 to account of grass mail for these sheep, and by its being acknowledged in the letters quoted above that the Defender owed the Pursuer the £21, it follows that the sheep were not returned, otherwise he could not have been in the Pursuer's debt, but the Pursuer in his.

"That there was a debt owing for sheep in 1814 *over and above* the £21 is instructed by the letter of 5th February 1814 and no payments other than those credited to the Defender being alleged to have been made, that debt must of course be still owing. Nor was the amount ever stated at £7, 13s. except in the imagination of the Defender himself. It was just £15, 10s. 6d., besides Interest which the Defender well knew. And £7, 13s. he might calculate as the moiety or share at the rate of 10s. p. pound. But the debt was never given up or discharged for the offer was to pay the £21 compleat, over and above the share or moiety of the sheep not got back, at the rate of 10s. p. pound. And this offer not being implemented it now goes for nothing.

"Even so late as 24th May 1817 the Defender writes as follows:— 'Knowing that you will need money just now I enclose you a note of £5. I meant to have sent double that sum, but am sorry to find it is at present out of my power. I will however endeavour to pay you other £11, and then I will fight you fairly out, before I give you any more. Be sure I will send you this as soon as I can.' But to shew that the Defender did not consider the £11 as in full of the debt it is sufficient to refer to the state libelled on, which proves that he actually did afterwards pay £13, 4s., and even at a later date, he writes from

Eltrieve Lake: 'I am sorry at disappointing you but I have got no money as yet. If it do not come with Robert Hogg on Thursday I must go to Edinburgh for it; and the first money I can lift you shall have a part, though all that I can spare will be but of small avail to you.' The £21 with interest is not yet nearly paid up as the whole payments only amount to £23, 4s., and there was 8½ years interest due before one farthing was paid: and the other debt is also due as claimed.

"Thus had even prescription been pleaded it could have availed nothing as the Pursuer has written evidence after the years of prescription that there was due £21 of money advanced '*over and above*' the sheep not returned, which bars the threat in the letter first quoted, 'remember I am not owing you a sixpence, and I care not for any diligence you can use.' The Pursuer therefore humbly conceives himself entitled to decree for the sum claimed in terms of the libel; and for full expenses.—In Respect Whereof,

"(Signed) JOHN PATERSTON, Junr."

The following letters were produced:—

"ST. BOSWELLS, *July 18, 1807.*

"Sir,—I have received from you 139 lambs which I oblige myself to graze until Whitsunday at the rate of six shillings and six pence per sheep and to pay you seven shillings and six pence for every one amissing and to smear them at my own expense.

"(Signed) JAMES HOGG.

"To Mr. Walter Cunningham."

"*November 17.*

"Dear Sir,—Your hogs were all smeared but two and I believe other two are dead of the sickness since. I have taken grass for 100 of the leanest of yours and Mr. Laidlaw's and if I can get it I will be obliged to take grass for some more for I cannot get quit of my ewes at any price. The hogs are dark smeared and look very well but are not nor never have been in high condition. It is customary for those who graze sheep by the year to get full mail at Martinmas for all that are smeared but as I have to account to you for the dead I will not ask above one half of it which as it can make no difference to you, you must not fail to oblige me with. No man knows of our transaction, nor do I wish any man to know, but as there is some people near you

to whom I owe some money I will send them with an order upon you, for a loan of so much and you may take their receipt for it. Now my dear sir you must not neglect to answer this for it will not be a little for my credit that you appear thus to lend me money on demand, in attending to the above you will oblige your affectionate friend.

“(Signed) JAMES HOGG.”

“November 18, 1807.

“Dear Sir,—Please be so good as pay to Mr. Andrew Laidlaw Seven pounds sterling according as you promised for me and I will answer you in due time.—I am Sir Your Most Obedt.,

“(Signed) JAMES HOGG.”

“EDINBURGH, Febr. 18th.

“Dear Sir,—I lifted £10 yesterday and intended sending you the half of it with the carrier but when I received yours talking about sending you £20 and giving me time for the rest, I am determined to send you no more till I learn the extent of your supposed claim; as I did not conceive I owed you £20 by at least 5. If you are going to make such claims as that on me remember I am not owing you a sixpence and I care not for any diligence you can use.—I remain, Sir, Yours most Respectfully,

“(Signed) JAMES HOGG.”

“EDIN., Febr. 5th, 1814.

“Dear Sir,—After consulting with my friends I have resolved to comply with your demand, namely that on giving me a free discharge at present, I shall consider myself bound afterwards to make up to you the £21 compleat, over and above your share of the loss in sheep and this I bind myself to do, trust to your honour not to mention it publicly, nor harass me for the money until I can conveniently pay it. In the mean time be so kind as send orders to some one here to sign your acceptance of the terms, and security offered; on which you will get a bill or line for the moiety—if you could do this without a day's delay it would particularly oblige.—Sir Your very Obedt. Servt.

“(Signed) JAMES HOGG.”

“EDIN., May 24, 1817.

“Dear Walter,—Knowing that you will need money just now I enclose you a note of £5. I meant to have sent double that sum but am sorry to find that it is at present out of my power. I will however

endeavour to pay you other £11 and then I will fight you fairly out before I give you any more. Be sure I will send you this as soon as I can. I am very vexed that James is going away; he will not leave a finer fellow behind him.—I am, dear Sir, Yours Very Truly,

“(Signed) JAMES HOGG.”

“ELTRIEVE LAKE, *Janr. 14th.*

“Dear Sir,—I am sorry at disappointing you but I have got no money as yet if it do not come with Robert Hogg on Thursday I must go to Edin. for it and the first money I can lift you shall have a part, though all that I can spare will be but of small avail to you—if you knew how hardly I have been set for some time you would not press me.—Yours Very Truly,

“(Signed) JAMES HOGG.”

The following judgment is in Sir Walter Scott's handwriting. The paper is much torn and frayed, and the words are, at parts, illegible:—

“SELKIRK, 30 *May* 1821.—The Sheriff-Substitute having advised with the Sheriff-Depute finds that prescription is in this case interrupted by the various acknowledgements in the correspondence produced that the debt is resting owing. Finds that there is no proof of Mr. Cunningham having accepted the composition proposed by the Defender in his letter of 5th February 1814 and that even his acceptance of that composition could not . . . or barred the pursuer from claiming . . . which is therein specially reserved over and above. . . . Decerns in terms of the Libel, and finds expenses due.

“(Signed) CHAS. ERSKINE.”

• 108.

1824.—*Parent and Child: Aliment.*

THE HERITORS AND KIRK-SESSION OF YARROW *against* JAMES SHIEL.

This was an action for recovery of £2, 8s. paid by the pursuers to (poor) Nanny Campbell for the aliment of an illegitimate child. They also called in the defender to aliment said child in future. The child in question was one of twins. By arrangement with the mother the defender took one of the children away and provided for it. He objected to this action on the grounds (1) that the mother of the children was not a party to the action, and (2) that the mother of an illegitimate child was bound to pay half the expenses of aliment.

The following was the judgment written in Sir Walter's handwriting :—

"SELKIRK, 26 May 1824.—The Sheriff-Substitute having advised with the Sheriff-Depute finds that the Respondent not having denied the paternity of the natural child in question is liable to relieve the parish of the burthen of its maintenance independantly of the adjustment of any mutual claims betwixt the mother and himself therefore finds him liable in repayment of the sum of £2, 8s. advanced by the parish on the child's account and also to free and relieve the Parish of Yarrow of the expense of its maintenance in future and Decerns. But finds no expenses due to either party. (Signed) CHA. ERSKINE."

109.

1828.—*Assault.*

JOHN GORDON, labourer, in Bridge End, *against* JAMES FLETCHER, gamekeeper, Bowhill.

Petition for damages for assault and for the return of a gun forcibly taken from petitioner.

The circumstances and judgment are set forth at p. 106.

110.

1828.—*Master and Servant : Apprentice : Indenture : Damages for Dismissal.*

GEORGE CHISHOLM, weaver, Galashiels, for his son JOSEPH CHISHOLM, a minor, *against* JAMES and HENRY BROWN, clothiers, Galashiels.

An action by apprentice against his employers for damages for dismissal.

The circumstances and judgments are set forth at p. 103.

111.

1829.—*Turnpike Roads Act : Damages for Detaining Stage-Coach.*

JOHN CROALL & COMPANY, coach proprietors, Edinburgh, *against* ALEXANDER GOVENLOCK, tacksman, Sunderland Toll-Bar.

This was an action for damages for detaining a stage-coach belonging to the pursuer.

The circumstances and judgments are set forth at p. 40.

112.

1831.—*Defamation.*

ALEXANDER HAIG, farmer, St. Helens, with consent of the Procurator-Fiscal, *against* WILLIAM PATERSON, stocking-maker, Selkirk.

This was an action concluding for £50 as damages for defamation.

The circumstances and judgment are set forth at p. 25.

113.

1831.—*Prescription.*

THOMAS DOUGLAS, Earlston, *against* ALEXANDER CUNNINGHAM, farmer, Carterhaugh.

An action for £16, 10s., the balance of the price of turnips. The defence was prescription.

The circumstances and judgment are set forth at p. 108.

114.

1820.—*Right of Way : Trespass.*

HIS GRACE THE DUKE OF BUCCLEUCH *against* EBENEZER BEATTIE, tenant in Oakwood.

This was an action for damages and interdiet for illegal trespass on the road through Bowhill Grounds from the General's Bridge over Yarrow to Colin's Bridge over Ettrick.

The process is not amongst the Sheriff Court papers. An interlocutor by Sir Walter Scott, dated 26th July 1820, a copy of which appears in a minute of the County Council in connection with a recent question regarding this road, bears that the Sheriff found "that the road in question was shut up by the trustees in the regular exercise of their discretionary power under the Statute, and after such due notification made to all persons concerned as the Statute requires; farther, finds the said Ebenezer Beattie liable in damages for breaking and forcing open the said gate, in respect that in so doing he committed a trespass on the private property of the complainer, modifies the said damages to One guinea sterling and decerns; finds Mr. Beattie liable in expenses of process, and allows an account thereof to be given in."

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